SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 712

THE INTERNATIONAL ASSOCIATION OF MACHINISTS, *Petitioner*,

v.

VINCENT P. BRADY, *Respondent*.

No. 713

TRANS WORLD AIRLINES, INC., *Petitioner*,

v.

VINCENT P. BRADY, *Respondent*.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDICES TO PETITIONS

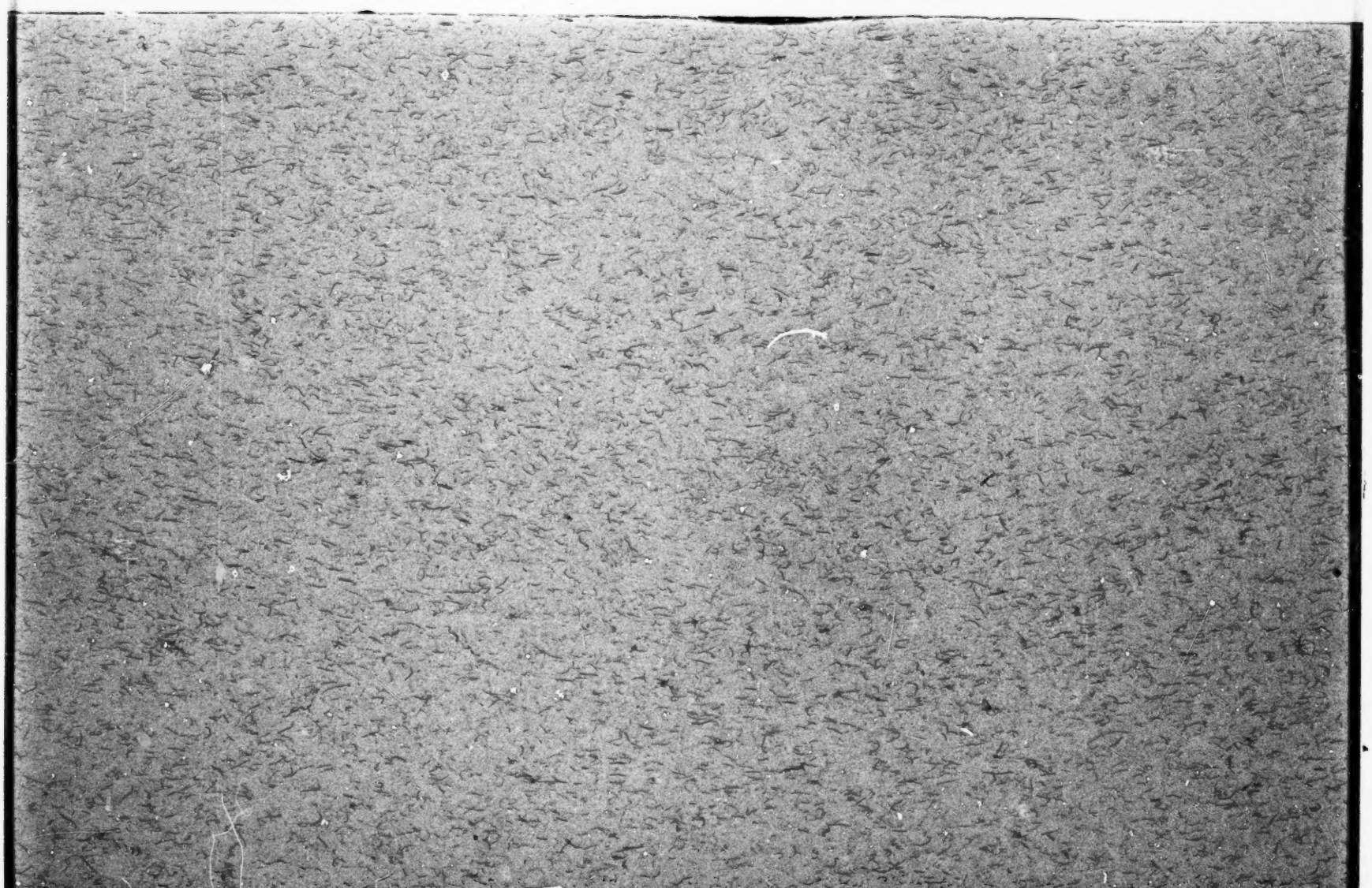
Statutory Provisions and Opinions of District Court and Court of Appeals

HAROLD L. WARNER, JR.
25 Broadway
New York, New York 10004
Counsel for Trans World Airlines, Inc.

JAMES L. HIGHSAW, JR.
620 Tower Building
Washington, D. C. 20005
Counsel for International Association of Machinists

November, 1968

Phillips of Dennis S. Adams Printing, Inc., Washington, D. C.



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APPENDIX A

Statutes Involved

SEC. 2, First. [45 U.S.C.A., Section 152] It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a

carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) To make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and pen-

alties) uniformly required as a condition of acquiring or retaining membership.

(b) To make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in Section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deduction from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier who is not a member of any one of the labor organizations, national in scope, organized

in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provision in paragraphs Fourth and Fifth of Section 2 of this Act in conflict herewith are to the extent of such conflict amended.

SECTION 204. [45 U.S.C.A., Section 184] The disputes between an employe or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing up the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

APPENDIX B

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16266, 16267 and 16268

VINCENT P. BRADY

v.

TRANS WORLD AIRLINES, INC., and THE INTERNATIONAL ASSOCIATION OF MACHINISTS

VINCENT P. BRADY, *Appellant in No. 16266*

TRANS WORLD AIRLINES, INC., *Appellant in No. 16267*

THE INTERNATIONAL ASSOCIATION OF MACHINISTS, *Appellant in No. 16268*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued September 26, 1967

Before McLAUGHLIN, HASTIE and FORMAN, *Circuit Judges.*

Opinion of the Court

(Filed August 13, 1968)

By FORMAN, *Circuit Judge.*

This litigation, protracted over more than eleven years, concerns the suit brought by Vincent P. Brady against his union, The International Association of Machinists (IAM),[1]

[1] The present name of this organization is International Association of Machinists and Aerospace Workers.

for breach of its duty of fair representation, and his employer, Trans World Airlines, Inc. (TWA), for wrongful discharge violative of the Railway Labor Act.[2] In an order filed November 4, 1963, the United States District Court of the District of Delaware found against TWA and IAM on the issue of liability. By its order filed September 6, 1966, Mr. Brady was awarded damages by way of back pay and reinstatement in both his former employment and in his union membership. From these and previous orders TWA[2a] and IAM[2b] appealed. Mr. Brady has cross-appealed maintaining that the District Court erred, among other things, in so far as it limited the recoverable damages.[2c]

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[2] 45 U.S.C. § 151 *et seq.*

[2a] TWA noticed its appeal from the "final judgment entered . . . on September 6, 1966 . . . except so much as provides 'that plaintiff's application to join as a party-plaintiff plaintiff's wife be and the same is denied' and from each and every other order entered herein which entered into the making of said final judgment."

[2b] IAM noticed its appeal from the following:

"(1) The portion of the order of November 12, 1959, denying defendants' motions to dismiss the second amended complaint and to strike certain portions thereof;

"(2) The portion of the order of August 4, 1961, denying defendants' motions for summary judgment;

"(3) The order of November 4, 1963, holding defendants to be liable to the plaintiff;

"(4) Paragraphs one through six of the order of September 6, 1966, awarding damages to the plaintiff."

[2c] In his notice of appeal, as amended, Mr. Brady particularized the denial by the District Court of

(1) His demand for a jury trial

(2) His applications for

(a) punitive damages

(b) attorneys' fees and costs

(c) the value of free passes available to employees of TWA and

(d) leave to join his wife as a party plaintiff.

The complicated factual background of this case has been amply set forth in the several opinions of the District Court.[3] Therefore the particular facts will be adverted to herein only as they are necessary for a general understanding of the several issues raised in these appeals.

In 1951, Mr. Brady, who was previously employed by TWA, was rehired as a line mechanic and worked at the Philadelphia International Airport until May 15, 1956, the date of the alleged wrongful discharge. During this period he was a member of Local Lodge 1776 of IAM. In October 1955, a campaign was begun to raise the membership dues of Local 1776. At the November 1955 meeting the lodge members voted to raise the dues for persons in Mr. Brady's classification from $3.00 to $3.25 per month. Many members of the lodge who like Mr. Brady, had not been present, complained to him, as a shop steward, about the dues increase because they had not received sufficient notice of the time and place of the November meeting. At the December meeting, the members adopted Mr. Brady's motion that the prior dues increase be rescinded; that the issue be brought before the next general membership meeting after the posting of due notices. Nevertheless, notices were not posted and the general membership meeting was not held in January.[4] In

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[3] 156 F. Supp. 82 (D. Del. 1957); 167 F. Supp. 469 (1958); 174 F. Supp. 360 (1959); 196 F. Supp. 504 (1961); 223 F. Supp. 361 (1963); 244 F. Supp. 820 (1965); Civil No. 1884 (D. Del., filed September 6, 1966). The first of these citations reports the opinion of the late Chief Judge Paul Leahy who retired after its filing. The other citations refer to opinions by Chief Judge Caleb M. Wright.

[4] A special meeting was held in January 1956, but no mention was made of the dues question. When the dues matter was again handled at the February meeting in a manner unsatisfactory to him, Mr. Brady wrote a letter to A. J. Hayes, International President of the IAM, and Eric Peterson, Financial Secretary of the Grand Lodge, describing and protesting as illegal the manner in which the dues for Local Lodge 1776 had been increased. In his letter Mr. Brady enclosed his dues book and a check for three

protest to what he considered to be an illegal dues increase, Mr. Brady refused to pay his monthly dues at the new rate. Frequently thereafter he tendered his dues at the old rate and since these tenders were always rejected the record indicates that his last dues payment was for November 1955.

In January 1956, Gerald C. Coleman became the financial secretary of Local Lodge 1776. Shortly after assuming his office, Mr. Coleman began a program to collect all back dues from members of the lodge. On February 15, 1956, he posted a list of the nine members who on that date still owed dues for two or more months. Mr. Brady was then listed as owing dues for December and January. This posted notice threatened the nine members with action from the district office unless the dues were paid withn ten days. At the end of this ten day period, of those listed, only Mr. Brady, who continued to tender dues at the $3.00 rate, remained delinquent.

On March 3, 1956, Mr. Coleman cited Mr. Brady to Clifford Miller, General Chairman of District 142, which had jurisdiction over Local Lodge 1776, for his dues delinquency and sought discharge action. Mr. Brady received a letter dated March 13, 1956, from Mr. Miller advising him that he had not complied with the union security provisions of the TWA-IAM collective bargaining agreement and that unless he paid outstanding dues for four months including those of March, by March 28, he would be discharged from his employment by TWA. In response to this letter, on March 27, 1956, Mr. Brady tendered his dues book and a check for $10.50 to Mr. Coleman.[5] On instructions from

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months dues at the old rate and stated that he would reimburse the lodge if future actions showed that his tender was insufficient. On February 17, 1956, Mr. Brady received a letter from Mr. Hayes which stated that the dues increase "was handled properly."

[5] Mr. Brady believed the dues increase for persons of his classification was fifty cents rather than twenty-five cents, so his check was intended to cover three months dues at the increased rate.

Mr. Miller, Mr. Coleman wrote Mr. Brady on March 28 rejecting his tender as insufficient. For the first time, he demanded payment by April 4 of a $25.00 reinstatement fee, allegedly due pursuant to the IAM Constitution, and $9.75 for three months dues.

Mr. Brady feared that if he paid a reinstatement fee he would lose the five years seniority that he had accumulated with TWA. On April 3, 1956, Mr. Brady filed his first appeal with the TWA-IAM System Board of Adjustment (Board). On April 7, 1956, Mr. Coleman wrote to Mr. Miller advising him of Mr. Brady's failure to make payment as demanded. Mr. Miller, on April 9, 1956 certified to TWA that Mr. Brady should be discharged for violating the union security provision of the collective bargaining agreement. On April 10, TWA notified Mr. Brady of this certification.

At this point, Mr. Miller realized that Mr. Coleman had misunderstood the instruction given him and had mistakenly demanded in the letter of March 28, 1956, both a reinstatement fee and outstanding dues. Mr. Miller immediately cancelled Mr. Brady's discharge certification and on April 11, wrote to Mr. Brady explaining Mr. Coleman's error and demanding only payment of the $25.00 reinstatement fee by April 26. Mr. Brady answered Mr. Miller's letter by offering to pay all dues outstanding but requesting that he should be permitted to forego the reinstatement fee. Mr. Miller rejected this offer and again demanded the reinstatement fee. On April 24, Mr. Brady filed his second appeal to the Board arguing that he had not violated the union security provisions of the collective bargaining agreement. This appeal was dismissed at a hearing on May 4 as premature since it had been filed prior to May 1, 1956, the date of a second certification for discharge which Mr. Miller had sent to TWA. On May 5, 1956, Mr. Brady made a third appeal to the Board protesting the May 1 certification. A

hearing was held on May 14,[6] and the Board ruled that the discharge was proper under the union security provisions of the collective bargaining agreement. Accordingly, Mr. Brady was discharged from his employment by TWA effective May 15, 1956.

After unsuccessfully seeking a rehearing by the Board, on the charge that Mr. Miller had misrepresented facts at the hearings of May 4 and May 14, Mr. Brady, on April 22, 1957, filed a complaint in the District Court charging IAM with hostile discrimination in breach of its duty of fair representation and TWA with wrongful discharge in violation of the Railway Labor Act. Mr. Brady sought relief against IAM and TWA by way of reinstatement in the union and in his employment together with compensatory and punitive damages.

—I—

At the outset, both IAM and TWA challenge the subject matter jurisdiction of the District Court. They submit that pursuant to section 204 of the Railway Labor Act,[7] Article XII of the TWA-IAM collective bargaining agreement established a System Board of Adjustment to adjust and decide disputes or grievances arising out of the interpretation and application of the agreement. Paragraph (k) of Article XII provides that decisions of the Board in cases properly before it shall be final and binding on the parties. Article XXVI(f), one of the union security provisions, gives an employee the right to appeal his discharge to the Board. Several cases are cited which uphold the finality of adjust-

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[6] Mr. Brady did not attend the hearings of May 4 and May 14, held in Kansas City, Missouri, because, as he said in his letter to the Board, he believed the Board had before it all the necessary factual documents to substantiate his position.

[7] 45 U.S.C. § 184. The Railway Labor Act was made applicable to "carriers by air" in 1936. 45 U.S.C. § 181 *et seq.*

ment board decisions and circumscribe their reviewability by the courts.[8]

Focusing on these contractual provisions, it is argued that Mr. Brady elected to appeal to the Board, that hearings were held by that body on May 4 and May 14, 1956, and that Mr. Brady's discharge was determined to be proper under the collective bargaining agreement. Having elected to take this appeal to the Board, the assertion is made that its adverse decision is final and binding on Mr. Brady and that the courts may not review the merits of that decision. This argument, which seeks to sustain the Board's ruling, and to foreclose judicial review of the dispute, was properly rejected by the District Court.

The complaint in this case, as amended, charges IAM, which throughout the period in question was the plaintiff's exclusive bargaining agent, with hostile discrimination in refusing to accept tender of Mr. Brady's dues because of claimed delinquency, terminating his union membership and wrongfully citing him for discharge from his employment with TWA, actions which, it is alleged, IAM did not take against other members of Local Lodge 1776 who were said to be delinquent in the payment of their dues. Furthermore, IAM is charged with hostile discrimination in misrepresenting the facts pertaining to Mr. Brady's alleged dues delinquency at the hearings before the Board. These allegations make it clear, as the District Court noted, that plaintiff's controversy is primarily with his bargaining agent rather than his employer.

The propriety of disregarding the ruling of the Board is justified by an examination of the Board's statutory jur-

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[8] See, *e.g.*, Gunther v. San Diego A.E. Ry., 382 U.S. 257 (1965); International Ass'n of Machinists v. Central Airlines, 372 U.S. 682 (1963); Bower v. Eastern Airlines, 214 F. 2d 623 (3 Cir.), *cert. denied*, 348 U.S. 871 (1954).

isdiction. Section 204 of the Railway Labor Act [9] authorizes the establishment of air carrier adjustment boards and sets forth their jurisdiction as follows:

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . may be referred by petition of the parties or by either party to an appropriate adjustment board, . . ."

Subsequent language of this section limits the jurisdiction of air carrier adjustment boards to that granted to railway carrier adjustment boards as provided in section 3 of the Railway Labor Act.[10] The jurisdiction of railway carrier adjustment boards has been construed as encompassing disputes between employees and their employers, but not disputes between employees and their bargaining representatives. In *Conley* v. *Gibson*,[11] union members brought a suit against their bargaining agent for breach of its duty of fair representation. Their complaint was dismissed on the ground that the adjustment board had exclusive jurisdiction over the controversy. The Supreme Court, reversed, stating:

> "But § 3 First (i) by its own terms applies only to 'disputes between an employee or group of employees and a carrier or carriers.' This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining. The Adjustment

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[9] 45 U.S.C. § 184.

[10] 45 U.S.C. § 153.

[11] 355 U.S. 41 (1957).

> Board has no power under § 3 First (i) or any other provision of the Act to protect them from such discrimination." [12]

The District Court, relying on *Conley,* correctly ruled that since the Board was without jurisdiction to hear Mr. Brady's claim, which essentially charges IAM with hostile discrimination, the Board's decision could not bar judicial review of the merits of that controversy. That the employer was joined to afford complete relief and that the dispute may incidentally involve construction or interpretation of the collective bargaining agreement does not change the basic fact that the Railway Labor Act does not authorize adjustment boards to hear an employee's dispute against his union.

There is good reason for denying the jurisdictional authority of adjustment boards in so far as controversies between employees and their bargaining representatives are concerned. The membership of such boards is designed ot give representation to management and to the union.[13] Normally the board's composition would present no problem since its express statutory authority is to hear grievances between employees and their employers arising out of the collective bargaining agreement. In such a dispute the employee would expect his union, acting under its duty to prosecute fairly the grievances of its members, to repre-

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[12] *Id.* at 44-45. See Rumbaugh v. Winifrede R.R., 331 F. 2d 530 (4 Cir.), *cert. denied,* 379 U.S. 929 (1964); Cunningham v. Erie R.R., 266 F. 2d 411 (2 Cir. 1959); Wade v. Southern Pacific Co., 243 F. Supp. 307 (S.D. Texas 1965); Nobile v. Woodward, 200 F. Supp. 785 (E.D. Pa. 1962).

[13] Article XII(b) of the TWA-IAM collective bargaining agreement provides:

> "The System Board of Adjustment shall consist of four (4) members, two (2) selected by the Company and two (2) selected by the Union."

sent him before the board. This scheme, however, overlooks the possibility that the union's interest might conflict with the employee's and this is especially so in cases where the employee is charging the union with hostile discrimination. In such circumstances, the union can hardly be expected to press the employee's claim vigorously and forthrightly. The District Court's statement on this point bears reiteration:

> "It is simply repugnant to our standards of fundamental fairness and totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and representing the bargaining representative." [14]

The decision of this court in *Bower* v. *Eastern Airlines*[15] is relied on by IAM and TWA as requiring a recognition of the Board's ruling as final and binding upon the parties. In that case, Bower, having been discharged from his employment, appealed to the board charging his employer with wrongful discharge. The board sustained the discharge and Bower then reasserted the same claim in the District Court. This court held that the employee, having elected the administrative remedy in seeking settlement of a dispute concerning his employment could not obtain a judicial reexamination of the merits of the dispute. But the court went on to say: "This does not foreclose the consideration of questions of jurisdiction or of the essential fairness of the administrative proceedings, even when these issues are raised collaterally." [16] The situation presented by the present case seems to come squarely within the caveat of *Bower*. Moreover, it is significant that in *Bower*,

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[14] 167 F. Supp. at 472.

[15] 214 F. 2d 623 (3 Cir.), *cert. denied*, 348 U.S. 871 (1954).

[16] *Id.* at 626.

and like cases advanced with it, employees sought relief against their employers and not their unions.[17]

The conclusion that because the Board lacked jurisdiction to hear the dispute its decision does not preclude an independent judicial review of the controversy, of course, does not itself establish the District Court's jurisdiction. Here, the District Court, however, properly found that Mr. Brady had pleaded causes of action invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1337.

It is now well established that an exclusive bargaining agent has a fiduciary obligation imposed by federal law to fairly represent all those employees in the bargaining unit in the negotiation, administration, and enforcement of collective bargaining agreements.[18] The federal courts have subject matter jurisdiction to enforce this statutory duty of fair representation which imposes on the union an obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.[19] Although this duty imposed on the bargaining agent was originally restricted to the prevention of hostile

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[17] Gunther v. San Diego & A.E. Ry., 382 U.S. 257 (1965); International Association of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963); Elgin J.&E. Ry. v. Burley, 325 U.S. 711 (1945) (involved authority of union to exclusively represent employees before the National Railroad Adjustment Board and to settle their contract claims against employer); Finlin v. Pennsylvania R.R., 288 F. 2d 826 (3 Cir. 1961); Woolley v. Eastern Air Lines, 250 F. 2d 86 (5 Cir. 1957), *cert. denied*, 356 U.S. 931 (1958); Sigfred v. Pan American World Airways, 230 F. 2d 13 (5 Cir.), *cert. denied*, 351 U.S. 925 (1956).

[18] Conley v. Gibson, 355 U.S. 41 (1957); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Elgin, J.&E. Ry. v. Burley, 325 U.S. 711 (1945); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

[19] Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

discrimination based on racial prejudice,[20] it is now recognized that the statutory power conferred on unions imposes on them a corresponding duty which encompasses the prohibition of all forms of hostile discrimination.[21]

Mr. Brady sets forth in his complaint, as amended, allegations of "wilfull and deliberate" discrimination by the IAM, such as the arbitrary invocation of union security provisions which caused him to be discharged from his employment by TWA. These allegations clearly constituted a claim against IAM cognizable in the District Court. The assertion of TWA that the court lacks jurisdiction over the employer in such a suit has been clearly answered by the Court of Appeals for the Second Circuit in *Cunningham* v. *Erie R.R.*[22] In that case, which is strikingly similar to the instant case, the court stated:

> "If the District Court has jurisdiction to proceed against the union it is clear, we think, that it has also power to adjudicate the claim against the railroad. It would be absurd to require this closely integrated dispute to be cut up into segments."[23]

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[20] Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952).

[21] Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Rumbaugh v. Winifrede R.R., 331 F. 2d 530 (4 Cir.), *cert. denied*, 379 U.S. 929 (1964); Thompson v. Brotherhood of Sleeping Car Porters, 316 F. 2d 191 (4 Cir. 1963); Cunningham v. Erie R.R., 266 F. 2d 411 (2 Cir. 1959); Nobile v. Woodward, 200 F. Supp. 785 (E.D. Pa. 1962).

[22] 266 F. 2d 411 (2 Cir. 1959).

[23] *Id.* at 416. The policy of preventing the fragmentation of the controversy and adjudicating the entire matter in a single forum to assure complete relief was followed in Rumbaugh v. Winifrede R.R., 331 F. 2d 530 (4 Cir. 1964); Wade v. Southern Pacific Co., 243 F. Supp. 307 (S.D. Texas 1965); Nobile v. Woodward, 200 F. Supp. 785 (E.D. Pa. 1962).

Apart from the foregoing, Mr. Brady has stated other grounds which validly invoke the jurisdiction of the District Court against both IAM and TWA. He charges both defendants with causing his discharge in violation of section 2 (Eleventh) of the Railway Labor Act [24] which, in part, provides:

> "Eleventh. Notwithstanding any other provisions of this chapter, . . . any carrier or carriers . . . and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

There is no need to repeat the District Court's lengthy and careful analysis of this provision, its intended purposes and its effect on the court's jurisdiction of the present case. In

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[24] 45 U.S.C. § 152 (Eleventh). Hereafter paragraphs of 45 U.S.C. § 152 will be designated simply by their place in section 2 of the Railway Labor Act.

sum, the District Court reasoned that section 2 (Eleventh), which permits union shop agreements within prescribed limits, was intended as a proviso to section 2 (Fourth) (Fifth), which prohibited all employer conduct designed to influence or coerce employees to join or maintain membership in a labor organization.[25] In so analyzing the Railway Labor Act the District Court considered Mr. Brady's complaint as alleging that his discharge was not protected by the exception to prohibited employer conduct (section 2 (Eleventh)) and because his discharge was designed "to influence or coerce employees in an effort to induce them to join or remain . . . members of [a] labor organization",[26] it violated the anti-discrimination provisions of section 2 (Fourth). The District Court further reasoned that since the court's jurisdiction over complaints alleging violations of section 2 (Fourth) was clearly established, that jurisdiction should encompass suits involving section 2 (Eleventh), the proviso to section 2 (Fourth).[27]

It is the contention of TWA and IAM that this case involves the interpretation and application of the union security provisions of the collective bargaining agreement and, therefore, the adjustment board has exclusive jurisdiction. This argument, which assumes that public statutory rights, when incorporated in a collective bargaining agreement, becomes exclusively private contract rights, is a reiteration of the same argument that was rejected by the District Court. Under the view expressed by TWA and IAM, an employee who seeks to regain his job after being

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[25] 223 F. Supp. at 364-365.

[26] 45 U.S.C. § 152 (Fourth).

[27] 223 F. Supp. at 365. The District Court recognized an exception to this rule (196 F. Supp. at 507 n. 11). Suits involving section 2 (Eleventh) (c) were specifically left to a special board rather than the courts. See 45 U.S.C. § 153(f); Pennsylvania R.R. v. Rychlik, 352 U.S. 480 (1957).

discharged for alleged nonpayment of dues is required to appeal to the adjustment board, which consists of an equal number of representatives of the employer and the union.[28] By permitting a limited form of union shop in section 2 (Eleventh), Congress intended to relax the anti-discrimination provisions of section 2 (Fourth) (Fifth).[29] In so relaxing them, it did not intend an appeal to the adjustment board as the sole recourse for an employee seeking reinstatement in his employment after being discharged for alleged nonpayment of his union dues. Otherwise, in such a dispute, which pits an employee against his union and his employer, the very parties whose power he challenged, would have the additional power of deciding whether they had exercised it in a proper manner. The District Court properly concluded that "if application and interpretation of 2 (Eleventh) is the sole province of Adjustment Boards, then Congress did not 'relax' the prohibitions of 2 (Fourth) (Fifth) by enacting 2 (Eleventh); it repealed them."[30]

The jurisdiction of the District Court over the subject matter of this suit was well founded in view of the allegations in the complaint as amended of hostile discrimination and of violations of Mr. Brady's rights under section 2 (Fourth) (Eleventh) of the Railway Labor Act.[31]

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[28] See note 13, *supra*.

[29] S. Rep. No. 2262, 81st Cong. 2d Sess. 1950; U.S. Code Congressional & Administrative News, Vol. II, p. 4320.

[30] 223 F. Supp. at 366.

[31] In the opinion reported at 174 F. Supp. 360, 365, the District Court raises sua sponte a third source of federal court jurisdiction, namely, the validity of the union security provisions of the collective bargaining agreement in light of 45 U.S.C. § 152 (Eleventh)(a). In view of the disposition of this case, it is not necessary to consider this further jurisdictional basis.

— II —

The suit was heard by the District Judge without a jury [32] first on the issue of liability [33] and later on the question of damages.[34] He construed the complaint as raising alternative grounds for relief—a claim for hostile discrimination in breach of the bargaining agent's duty of air representation, and a claim for wrongful discharge in violation of section 2 (Fourth) (Eleventh) of the Railway Labor Act. After the hearing on liability, the District Court ruled that because Mr. Brady had proven facts sufficient to support recovery on the second claim, it would not make findings on the hostile discrimination claim.

The District Court found that under the union security provisions of the TWA-IAM collective bargaining agreement, an employee, in order to continue his employment, was required to maintain membership in good standing in the union by paying his monthly dues not later than the last day of the following calendar month.[35] Under this stand-

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[32] In an earlier opinion, reported at 196 F. Supp. 504, the District Court ruled that Mr. Brady was not entitled to have the action tried by a jury because the main relief he sought, reinstatement, was equitable, the other requests for monetary compensation such as back pay being accidental. Secondarily, it was held that the statutes relied upon do not embrace actions at common law and are thus outside the scope of the Seventh Amendment.

[33] 223 F. Supp. 361.

[34] 244 F. Supp. 820.

[35] Article XXVI of the TWA-IAM collective bargaining agreement provides in pertinent part:

> "(a) Each employee now or hereafter employed in any work covered by this Agreement shall, as a condition of continued employment in such work, within sixty (60) days following the beginning of such employment or the effective date of this Article, whichever is later, become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise

ard, the December dues were payable by the end of January, those for January by the end of February and those for February by March 31. The District Court ruled that IAM's March 13 demand for four months dues by March 28 was clearly excessive since Mr. Brady was then only in arrears for two months, or $6.50. Thus, when Mr. Brady responded to the letter of March 13 by sending his dues book

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herein. Such condition shall not apply . . . with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership.

"For the purpose of this Article, 'membership in good standing in the Union' shall consist of the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month, which are uniformly required of members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership."

* * *

"(e) When an employee becomes delinquent by not meeting the requirements of (a) above for 'membership in good standing in the Union', the following procedure shall be observed:

"(1) The General Chairman of the Union shall notify the employee by registered letter, return receipt requested, copy to the Company's Vice President of Industrial Relations, that the employee is delinquent in the payment of dues as specified herein and accordingly is subject to discharge as an employee of the Company. Such letter shall also notify the employee that he must make the required payment to the Financial Secretary of the Union's local lodge with jurisdiction at the location where he works within fifteen (15) calendar days of the date of mailing of the notice or be subject to discharge under the terms of the Agreement."

* * *

"(n) Whenever the term dues is referred to in this Article, such use of the word 'dues' shall include initiation or reinstatement fees, periodic dues, and assessments (not including fines and penalties), ..."

with $10.50 to the financial secretary of the local lodge, his tender was more than sufficient to pay his two months' arrearage,[36] and being valid, it precluded his discharge. Nor was any change wrought in the situation when IAM, by its letter of March 28 to Mr. Brady, rejected his tender as insufficient to cover three months dues of $9.75 and a reinstatement fee of $25 for which payment was not required by April 4. The rejection on the ground that the tender did not include the reinstatement fee was gratuitous for no such demand was made in the letter of March 13.

Under the IAM constitution a three months dues delinquency results in the automatic cancellation of membership[37] and to regain union membership a reinstatement fee must be paid. Although the collective bargaining agreement mentions reinstatement fees in its definition of dues, it does not specify when they are to be imposed. The District Court assumed that the IAM constitutional provision for a reinstatement fee was validly incorporated into the collective bargaining agreement by the "oblique reference" to such fees, and reasoned that this constitutional provision must be read in conjunction with the collective bargaining agreement which is the governing document under section 2 (Eleventh). On this approach the District Court found

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[36] Mr. Brady's tender of $10.50 was intended to cover three months dues, as explained in footnote 5, *supra*.

[37] Article E of the IAM constitution reads in pertinent part:

> "Sec. 14. Delinquency for 3 months in the payment of dues or assessments shall automatically cancel membership and all rights, privileges and benefits incident thereto. The period of good standing membership of members whose membership has been cancelled for delinquency, or other cause shall date from their last reinstatement, as shown by the G.L. records, and their rights, privileges and benefits under the provisions of this Constitution shall attach and date their last reinstatement, as though they had never before held membership in the I.A.M."

that the collective agreement postpones a delinquency until the end of the following calendar month. It therefore concluded that the three months delinquency did not occur until after March 31 and IAM could not properly impose a reinstatement fee, as it did, in its letter of March 28.

The basis for the District Court's reconciliation of the two documents was its view that the policy underlying section 2 (Eleventh), which validates a union security provision when incorporated into an "agreement", is to insure that employees will have adequate notice of their union security obligations and may rely on the provisions of the agreement rather than resort to ad hoc correspondence from union officials to determine their rights and duties. In this regard the District Court commented:

> "In the present case, however, the IAM's defense has been based almost exclusively upon letters sent to Brady which neither complied with the agreement nor were consistent with each other. There is no reason whatsoever why TWA and the IAM cannot incorporate clear union security provisions into their agreement which give adequate notice to the affected employees of the obligations imposed. Nor is there any reason why, having written such provisions into the agreements, they cannot apply them uniformly and comply with the requirements themselves. There is every reason why, however, they should not be allowed to discharge employees when they have failed to do these things. In the present case, the agreement is relatively clear, but IAM's rejection of Brady's March 27th tender did not comply with it and was utterly inconsistent with any obligations of which Brady had proper notice." [38]

Having concluded that Mr. Brady's tender of $10.50 on March 27 was "sufficient to cover 'the periodic dues * * *

[38] 223 F. Supp. at 369.

uniformly required * * *,' " and that no reinstatement fee could then have been imposed, the District Court held that the "discharge is not protected by 2 (Eleventh). It is, therefore, violative of 2 (Fourth)."[39] Liability was found to run against both IAM and TWA.

The foregoing views of the District Court are challenged by IAM and TWA principally on the ground that IAM's standard for "deliquency" was confused with the collective agreement's definition of "membership in good standing." Delinquency, they say, occurs when a member has not paid his dues for a calendar month by the last day of the following calendar month. Applying these standards to the present case, they conclude that because Mr. Brady had not paid his December, January and February dues he was delinquent for those three months on March 1. Accordingly his union membership, under the IAM constitution, was automatically cancelled. To regain his union membership he was required to pay a reinstatement fee. Failing to do so he was subject to discharge by TWA. Also, it is asserted that because Mr. Brady had not paid his December dues by January 31, he was no longer a member in good standing in IAM and was dischargeable under the terms of the collective bargaining agreement. In either case, they insist, IAM was justified in certifying Mr. Brady for discharge, and TWA was justified in discharging him.

We agree with the District Court's view that section 2 (Eleventh) makes the collective agreement the governing document and with the District Court's reconciliation of IAM's constitution with the agreement. The argument advanced by IAM and TWA is not persuasive and there are good reasons for rejecting it.

Even if the definition of "delinquency" which they propose is adopted, IAM was still unjustified in demand-

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[39] *Ibid.*

ing the payment of four months dues by March 28. Mr. Brady would not have become delinquent for March dues until after March 31. Thus, when he tendered $10.50 on March 27, it was more than sufficient to cover the dues delinquencies for the three months for which he was then in arrears. IAM admits that its letter of March 13 was erroneous in demanding the payment of four months dues by March 28 and that its letter of March 28 was again erroneous in demanding the payment of four months dues together with a reinstatement fee by April 4. It insists, however, that it "wiped the slate clean" on April 11 when it demanded only a reinstatement fee. This argument fails because while it attempts to explain away IAM's ineptness, it attempts also to "wipe the slate clean" of Mr. Brady's valid tender of dues sufficient to cover all past dues delinquencies. Mr. Brady's valid tender of dues made before IAM's certification for discharge under the union security clause precluded further discharge action against him.[40]

We are cognizant of the wholesome precepts which hold that healthy industrial relations cannot be preserved if unions are prevented from effective action to secure the prompt payment of dues where dues are required under a valid union security agreement and that a necessary concomitant of such effective action by a union is the responsibility of the employee that his dues are paid promptly

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[40] *Compare* International Union of Electrical Wkrs. v. NLRB, 307 F.2d 679 (D.C. Cir.), *cert. denied*, 371 U.S. 936 (1962) and NLRB v. Aluminum Wkrs. Int'l Union, 230 F.2d 515 (7 Cir. 1956), where a valid tender made before the union's certification was a barrier to the employee's discharge, *with* Producers Transport, Inc. v. NLRB, 284 F.2d 438 (7 Cir. 1960); NLRB v. Technicolor Motion Pictures Corp., 248 F.2d 348 (9 Cir. 1957) and International Ass'n of Mach. v. NLRB, 247 F.2d 414 (2 Cir. 1957), where the union's right to demand an employee's discharge was not barred by a belated tender of dues, made after the union's demand for discharge.

when due.[41] We do not intend to undercut these well stated pronouncements. But a delicate balance must be maintained between the union's right to preserve its own institutional existence and its sensitive obligations for fair dealing to its members under circumstances as are presented in this case. Mr. Brady cannot be characterized as the ordinary "free rider" absorbing union benefits without bearing a share in their costs. Rather he was a shop steward and had paid his dues until he challenged the manner in which they had been increased. While recalcitrant in accepting the new scale he ultimately relented and made a tender of all the past delinquencies prior to any demand by IAM upon TWA to discharge him.

However irritating IAM may have considered Mr. Brady's resistance to the relatively insignificant increase in the monthly dues, it still was his representative, clothed with the great power of separating him from his livelihood but also owing him the maximum of good faith and fair dealing. This imposed on it the obligation to inform him of his rights and duties so that he could take all necessary steps to protect his job.[42] If IAM seriously regarded Mr. Brady's membership as exposed to cancellation with consequent discharge on March 1, its fiduciary relationship with him compelled no less than an intimation to this effect instead of the erroneous demand of March 13 for four months dues by March 28. His response thereto on March 27 in the form of payment in excess of three months dues was sufficient to restore him to good standing. That offer preceded the next erroneous demand of IAM

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[41] See Producers Transport, Inc. v. NLRB, 284 F.2d 438 (7 Cir. 1960); NLRB v. Technicolor Motion Pictures Corp., 248 F.2d 348 (9 Cir. 1957).

[42] NLRB v. Hotel Employees Union, 320 F.2d 254 (3 Cir. 1963); International Union of Electrical Wkrs. v. NLRB, 307 F.2d 679, 683 (D.C. Cir. 1962).

for three months dues plus the first requirement to pay a reinstatement fee clearly indicating that IAM had indeed declared his membership automatically cancelled. The attempt to strike down the validity of his tender was totally inconsistent with the duty which IAM owed to Mr. Brady. When it chose not to accept the tender but elected to stand upon a precise enforcement of the automatic membership cancellation provision it erred, for the tender was timely to prevent rigid and severe enforcement of that provision.

The argument that after January 31, Mr. Brady was no longer a member in good standing of IAM and thus was dischargeable is also untenable. The collective bargaining agreement specifically sets forth procedural requirements which shall be observed when discharge is sought under the union security provisions.[43] IAM's failure to comply with them until after Mr. Brady had tendered dues sufficient to make him current also bars application of these provisions to him.

In the light of the foregoing we conclude, as did the District Court, that Mr. Brady's dues tender of March 27 was valid. Consequently IAM's certification to TWA was improper and his discharge by TWA violated section 2 (Fourth) (Eleventh) of the Railway Labor Act.

—III—

A. TWA challenges the District Court's conclusion that it is liable to Mr. Brady. Section 2 (Fourth) states, in part: "it shall be unlawful for any carrier . . . to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization. . . ."[44] TWA insists that to constitute a

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[43] See note 35, *supra*.

[44] 45 U.S.C. § 152 (Fourth).

violation of this section it must be established, as it must be under section 8(a)(3) of the National Labor Relations Act, as amended, that the employer has "reasonable grounds for believing" [45] that union membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues uniformly required. The argument continues with the assertion that the District Court held the discharge of Mr. Brady not protected by section 2 (Eleventh) and therefore violative of section 2 (Fourth) on one basis—that IAM rejected Mr. Brady's dues tender although it was timely and sufficient to cover periodic dues uniformly required. TWA asserts that the District Court made no findings that it was guilty of wrongdoing, and without such findings, TWA cannot be held liable for discharging Mr. Brady after IAM certified that he had not complied with the union security provisions of the collective bargaining agreement.

To adopt TWA's view, would require the court to read the intent standard of section 8(a)(3) of the National Labor Relations Act into section 2 (Fourth) (Eleventh) where no such standard was supplied by Congress. The District Court properly declined to do so. It concluded that after the employee established that his rights under the statute had been violated, the employer would be held liable. The Court of Appeals for the Second Circuit, in *Cunningham* v. *Erie R.R.*[46] adopted and approvingly cited the District Court's opinion and stated:

> "Once it is established, as here, that the expulsion of the worker from membership in the Union was . . . 'for any reason other than the failure of the employee to tender the periodic dues * * *uniformly required* as a condition of acquiring or retaining mem-

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[45] 29 U.S.C. § 158(a)(3).

[46] 358 F.2d 640, 645 (2 Cir. 1966). See generally Note, 76 Yale L.J. 210 (1966).

bership,' . . . (emphasis added), the Railroad, having discharged the employee on the representation of the Union that he had failed to tender such periodic dues, uniformly required, is automatically liable for wrongful discharge. See Brady v. Trans World Airlines, D.C. Del., 1963, 223 F. Supp. 361. This is because the limited protection afforded by the Railway Labor Act is no longer available as a defense."

The Second Circuit explained that it is probably because of this *automatic liability* that collective bargaining agreements in the industry provide for indemnification of the employer by the union for all liability arising from an unlawful union security discharge.[47] Like the District Court and the Second Circuit, this court concludes that the employer's liability is automatic, once it is established that the discharged employee's section 2 (Fourth) (Eleventh) statutory rights have been violated.

Aside from this conclusion regarding the employer's liability under the Railway Labor Act, there is evidence in the record warranting TWA's liability under the more demanding standard which it advances. In *Radio Officers' Union* v. *NLRB*,[48] the Supreme Court examined section 8 (a)(3) of the National Labor Relations Act and discussed the proof of motive required to establish a violation of that section. It stated:

"But it is also clear that specific evidence of intent to encourage or discourage [union membership] is

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[47] Article XXVI(p) of the TWA-IAM collective bargaining agreement provides:

"The Union shall indemnify and save the Company harmless against all forms of liability that shall arise out of or by reason of action taken by the Company, which action was requested by the Union under the provisions of this Article (Union Security)." (Parenthesis supplied.)

[48] 347 U.S. 17 (1954).

> not an indispensable element of proof of violation of § 8(a)(3). . . . This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. . . . Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. *Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence.* In such circumstances intent to encourage is sufficiently established." [49]

While the *Radio Officers'* case did not deal with a discharge resulting from a union's certification that the employee failed to comply with its dues requirements, the facts of that case and the context from which the above language was taken, make the rule set forth therein applicable here. A discharge under a union security clause for failure to comply with the union's dues demands *inherently* encourages other employees to promptly comply with union "membership" requirements. In such circumstances, if the discharge is improper the employer will necessarily have discriminated against the employee and it will be *presumed* that the employer intended the foreseeable consequence of his act, that is, the encouragement of union membership.

In the instant case there is no finding that TWA rebutted the above stated presumption, nor does an examination of the record lead to that conclusion. On the contrary, the record discloses that immediately after he learned that his dues tender of March 27 would be rejected, Mr. Brady

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[49] *Id.* at 44-45. (Emphasis added.)

explained his dues dispute to the TWA General Foreman. Mr. Brady was simply advised to pay what the union demanded; later he was advised that the matter was merely one between him and IAM and that TWA was not involved. The record also indicates that TWA had copies of IAM's various letters to Mr. Brady which revealed the inconsistent positions taken by IAM. On these facts, it would be difficult to conclude that TWA overcame the presumption that it intended the foreseeable consequences of its act. Thus, the District Court's conclusion that TWA is liable to Mr. Brady for its violation of section 2 (Fourth) (Eleventh) is further fortified.

B. Having concluded that Mr. Brady's rights under the Railway Labor Act had been violated, a further question which then faced the District Court was whether the IAM should be held jointly liable with TWA for causing the wrongful discharge. Section 2 (Fourth) was designed to prevent employers from coercing employees with regard to their relationships with the unions. That section does not expressly refer to labor organizations, but section 2 (Eleventh) speaks in terms of the "agreement" which the employer and the labor organization may formulate. The District Court justifiably reasoned that since both the employer and the union were treated alike in section 2 (Eleventh), and that section is an exception to the anticoercion provisions of section 2 (Fourth), Congress contemplated that unions would also be held liable for causing a discharge in violation of section 2 (Fourth) (Eleventh).

That Congress intended labor organizations should be held accountable for violations of section 2 (Fourth) (Eleventh) is no more than rational. Generally, in dues disputes, it is the union which instigates the discharge, and an illegal application of the union security provisions can scarcely be originated by any other source than the union. Just as in hostile discrimination actions against the union where the employer has been declared a proper party de-

fendant,[50] in suits involving section 2 (Fourth) (Eleventh) unions should be held liable for their actions in procuring a discharge which violates the employees' statutory rights.[51]

Still with regard to the liability of IAM, brief mention should be made of its argument that the District Court erred in not granting judgment to it because of Mr. Brady's failure to exhaust his internal union remedies. The District Court correctly reasoned that this section 2 (Fourth) (Eleventh) phase of the case involves the legality of Mr. Brady's discharge from his employment and not the legality of IAM's dues increase. The doctrine, relied on by IAM, applies to situations unlike the present one, which concern wholly internal union matters. The present dispute focuses on the employment relationship rather than the union relationship. Furthermore, Mr. Brady is seeking reinstatement in his employment, a remedy that is unavailable to him within the internal union procedures. These reasons justified the District Court in determining that Mr. Brady was not required to exhaust his internal union remedies before bringing suit against IAM for violation of section 2 (Fourth) (Eleventh).

C. After holding that Mr. Brady's statutory rights had been violated and that as a result liability runs against both TWA and IAM, the District Court considered the remedies available to Mr. Brady. It concluded that appropriate for such a violation were reinstatement in his employment with back pay and reinstatement as a member in good standing in IAM.[52]

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[50] See note 23, *supra*, and accompanying text.

[51] That IAM should be held liable for its actions in causing a violation of section 2 (Fourth) (Eleventh) is all the more justified in the instant case since IAM is required to indemnify TWA for any liability imposed on it as a result of IAM's improper application of the union security provisions. See note 47, *supra*.

[52] The District Court discussed remedies at 244 F. Supp. 820 and in its unreported opinion at Civil No. 1884 (D.Del., filed September 6, 1966).

It is argued that the District Court was without authority to order Mr. Brady reinstated in his employment, and that in so doing the District Court departed from the rules established in several Supreme Court cases.[53] These cases are relied on for the proposition that an employee aggrieved by his discharge has alternative remedies: (1) if he wishes to retain his employment, he must pursue his remedy under the administrative procedures established by the applicable collective bargaining agreement subject to the Railway Labor Act and his right of review before the System Board of Adjustment; (2) if he accepts his discharge as final he may bring an appropriate action at law seeking money damages. In none of these cases was an employee discharged under a union security provision, and in each of these cases it was assumed that the adjustment board would have jurisdiction to hear the cause if the employee sought reinstatement before it. In part I above, it was held that the Board was without jurisdiction to entertain Mr. Brady's complaint which was directed against both TWA and IAM. Under these circumstances, when procedures for reinstatement are otherwise unavailable to him, the purposes of the Railway Labor Act would best be served if an employee seeking to regain his job may invoke the equitable powers of the court. We agree with the District Court that reinstatement, in the present case, was an appropriate remedy and that it had authority to so order.

The District Court implemented the reinstatement by requiring TWA to secure, without cost to Mr. Brady, such additional training and schooling as would be necessary for his reemployment in a position substantially equivalent to that which he would have attained had he not been dis-

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[53] Walker v. Southern Ry., 385 U.S. 196 (1966); Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953); Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950); Moore v. Illinois Central R.R., 312 U.S. 630 (1941).

charged. TWA vehemently objected because of the excessive cost of such a training program for Mr. Brady in light of the vast changes occurring in the airline industry during the interruption in his service. However, the District Court considered all the factors involved and properly concluded that although some hardship would be imposed on TWA, it should not bar Mr. Brady's restoration as an adequate aircraft mechanic. In requiring Mr. Brady's reinstatement, the District Court also correctly ruled that he was entitled to the fringe benefits he would have had if he had not been discharged.[54]

The back pay award of $10,617.80 was computed by subtracting from the amount Mr. Brady would have earned from TWA if he had not been illegally discharged, the amount he actually earned following his discharge. The arguments advanced against this award and the manner in which it was computed are without merit.

—IV—

The District Court took the position that whether Mr. Brady established his claim for hostile discrimination or his claim for violation of his express statutory rights under section 2 (Fourth) (Eleventh) his remedy would be the same. On this premise it declined to rule on the hostile discrimination claim once it was satisfied that a violation of section 2 (Fourth) (Eleventh) had been proved. We

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[54] Specifically the District Court ordered TWA to secure, without cost to Mr. Brady, his membership in the following Group Plans: Life Insurance, Hospital, and Health and Accident or the equivalents thereof. Membership in the Retirement Fund was also ordered with all payments due thereunder to be made by TWA, to be paid by it, and all payments due by Mr. Brady, to be paid by him. The District Court properly declined to award Mr. Brady any damages for the loss of the value of airline passes to which he would have been entitled had he continued to work for TWA on the ground that he had not introduced sufficient evidence on which such an award could be based.

agree that Mr. Brady was not entitled to recovery on his hostile discrimination claim, but we arrive at this result for reasons which differ from those of the District Court.

The complaint and its amendments are artlessly drawn and the prayers for relief are, to say the least, confusing. However, the District Court, with commendable liberality, interpreted them as raising two separate claims. The first, alleging violation of section 2 (Fourth) (Eleventh), which has been discussed at length, was directed at both TWA and IAM. This claim involved the legality of Mr. Brady's discharge from his employment. The second, alleging hostile discrimination in violation of its duty of fair representation, was directed at IAM. In so far as the first claim is concerned, we have agreed with the District Court that because it involved the propriety of the discharge, and thus the employment relationship, Mr. Brady was not required to exhaust his internal union remedies. With regard to the claim for hostile discrimination, the opposite conclusion is dictated.

In a suit alleging hostile discrimination violative of the bargaining representative's duty of fair representation, it must be proved not only that the union's actions were improper, but that they were undertaken with malice and bad faith.[55] Mr. Brady alleges that he was accorded different treatment from other members of his lodge who were similarly delinquent in their dues payments and also that at the hearing before the Board, Mr. Miller, an IAM official, misrepresented pertinent facts. In making these allegations, Mr. Brady is not challenging his discharge from his employment, but rather the fairness and propriety of the manner in which he was treated by IAM. Such a

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[55] Vaca v. Sipes, 386 U.S. 171, 190 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Cunningham v. Erie R.R., 266 F.2d 411, 417 (2 Cir. 1959).

claim involves the union-member relationship and not the employer-employee relationship.

It has been the general rule, and the rule of this circuit, that before a suit against a union for breach of its duty of fair representation may be brought in the courts, the member must first exhaust the available internal union remedies, or show an adequate reason for failing to do so.[56] There is good reason for this rule which forestalls judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own legitimate affairs. Mr. Brady was a shop steward and that he was knowledgeable of appellate union procedures may be inferred from his letter in February 1956 to the International President of IAM and others in which he protested the manner in which the dues of his local lodge were increased. Nevertheless, there is no allegation or evidence that he invoked any appellate union procedures to redress the asserted unfair and arbitrary action against him by the local and district officers. Nor does he advance an adequate reason for his failure to do so. Mr. Brady's argument that it would have been futile to ask IAM to review its own dealings with him is not tenable for IAM's internal procedure pro-

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[56] Gainey v. Brotherhood of Railway & Steamship Clerks, 275 F.2d 342, 345 (3 Cir.), *cert. denied*, 363 U.S. 811 (1960), and 313 F.2d 318 (3 Cir. 1963); see, *e.g.*, Foy v. Norfolk & W. Ry., 377 F.2d 243, 246 (4 Cir. 1967); Neal v. System Board of Adjustment, 348 F.2d 722 (8 Cir. 1965); Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2 Cir.), *cert. denied*, 366 U.S. 929 (1961). See the following proviso contained in the Bill of Rights of the Members of Labor Organizations, 29 U.S.C. § 411(a)(4):

> "*Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof."

vided reasonably prompt review of his contentions on union levels higher than those responsible for the decisions against him.[57]

It is conceivable that an award of damages by a court against a union for hostile discrimination could supplement the relief available for a violation of section 2 (Fourth) (Eleventh). However, in this case, Mr. Brady's claim for such damages may not be sustained because of his failure to exhaust internal union remedies or to adequately explain that failure. Having reached this conclusion, it is obviously unnecessary to consider Mr. Brady's demand for a jury trial on his claim for hostile discrimination and the propriety of the particular damages sought thereunder.[58]

Mr. Brady's successive attorneys before the District Court declined to press for the allowance of fees to them and his appeal from the denial thereof is baseless. His request for similar fees on this appeal is also without merit.

For the foregoing reasons, the orders of the District Court from which Vincent P. Brady has appealed at No. 16,266 and those from which Trans World Airlines, Inc. and The International Association of Machinists have respectively appealed at Nos. 16267 and 16268 will all be affirmed.

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[57] See International Ass'n of Machinists v. Friedman, 252 F.2d 846 (D.C. Cir.), *cert. denied*, 357 U.S. 926 (1958) where the court reveiwed the internal appellate procedures of IAM and deemed them fair and adequate.

[58] Mr. Brady demanded punitive damages against IAM and compensatory damages for mental anguish arising from the humiliation and embarrassment he suffered. By a belated application which was denied by the District Court, Mr. Brady moved to further amend his complaint to join his wife who sought damages for loss of his consortium.

Each of the parties to these respective appeals will bear his own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX C

Judgments of United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,266

VINCENT P. BRADY, *Appellant*

v.

TRANS WORLD AIRLINES, INC., a corporation of the State of Delaware, and THE INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association

(D. C. Civil Action No. 1884)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: HASTIE, *Chief Judge*, and McLAUGHLIN and FORMAN, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 6, 1966, be, and the same is hereby affirmed. Each of the parties to this appeal to bear his own costs.

ATTEST:

THOMAS F. QUINN
Clerk

August 13, 1968

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,267

VINCENT P. BRADY, *Appellant*

v.

TRANS WORLD AIRLINES, INC., a corporation of the State of Delaware, and THE INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association

TRANS WORLD AIRLINES, INC., *Appellant*

(D. C. Civil Action No. 1884)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: HASTIE, *Chief Judge*, and MCLAUGHLIN and FORMAN, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 6, 1966, be, and the same is hereby affirmed. Each of the parties to this appeal will bear his own costs.

ATTEST:

THOMAS F. QUINN
Clerk

August 13, 1968

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16,268

VINCENT P. BRADY, *Appellant*

v.

TRANS WORLD AIRLINES, INC., a corporation of the State of Delaware, and THE INTERNATIONAL ASSOCIATION OF MACHINISTS, an unincorporated association

THE INTERNATIONAL ASSOCIATION OF MACHINISTS, *Appellant*

(D. C. Civil Action No. 1884)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: HASTIE, *Chief Judge*, and MCLAUGHLIN and FORMAN, *Circuit Judges*.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that that portion of the order of the said District Court, filed November 12, 1959, which denied defendant's motions to dismiss the second amended complaint and to strike certain portions thereof, the portion of the order, filed August 4, 1961, which denied defendant's motions for summary judgment, the order, filed November 4, 1963, holding defendants liable for damages, and paragraphs one through six of the judgment, filed September 6, 1966, awarding damages to plaintiff, be and the same are hereby affirmed. Each of the parties to this appeal will bear his own costs.

ATTEST:

THOMAS F. QUINN
Clerk

August 13, 1968

APPENDIX D

Opinions of the United States District Court for the District of Delaware

UNITED STATES DISTRICT COURT

D. DELAWARE.

Civ. A. No. 1884.

Vincent P. Brady, *Plaintiff,*

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and The International Association of Machinists, an unincorporated association, *Defendants.*

Oct. 5, 1957—156 F. Supp. 82

* * * * * * * * * *

LEAHY, Chief Judge.

The facts appearing from the paper record show: In 1948, plaintiff, Vincent P. Brady, became a member of The International Association of Machinists ("IAM") an unincorporated association, District Lodge No. 142, Local Lodge No. 1244, located in Wilmington, Delaware. Brady lived there. In February 1951, he was recalled by Trans World Airlines, Inc. ("TWA"), a Delaware corporation, for work in Philadelphia. In August 1952, he became a member of Local Lodge No. 1776 of the IAM in Philadelphia. On March 28, 1956, he was notified by the union he was in default on certain payments for dues and a reinstatement fee and the sum theretofore tendered by him was insufficient to cover this amount.[1]

On April 24, 1956, and May 5, 1956, Brady wrote to the System Board of Adjustment requesting a hearing, but without prejudice to his rights to file a subsequent court

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[1] Letter of March 28, 1956, from Gerald C. Coleman, Financial Secretary of Local Lodge No. 1776, IAM, to Vincent P. Brady.

proceeding.[2] Hearings were held by the Board in Kansas City, Missouri, on May 4 and 14, 1956. He had notice of these hearings. He did not attend. On May 14, 1956, the Board decided adversely to Brady.[3] On May 15, 1956, he was discharged from employment by TWA pursuant to the collective bargaining agreement between TWA and IAM which required good standing membership in the union as a condition of employment.[4]

On February 4, 1957, Brady wrote to the Board and requested reconsideration of its decision, alleging that Cliff Miller, General Chairman, District 142 of IAM, who appeared at the hearing of May 14, 1956, on behalf of IAM, misrepresented vital facts to the Board.[5] The Board denied this request and affirmed its May 14, 1956, decision as final and binding.[6] On April 22, 1957, Brady then brought his action to this court against both TWA and IAM seeking 1. reversal of the decision of the Board, 2. reinstatement of employment with payment to him of all wages, overtime pay, and vacation pay since his discharge, 3. reinstatement of all other benefits held by him as an employee including a $15,000 life insurance policy, a sickness and benefit policy, credit union privileges, retirement benefits and seniority status, 4. judgment against either or both defendants for damages for humiliation and embarrassment suffered by reason of the discharge without just cause by TWA, 6. allowance of a reasonable at-

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[2] Letters of April 24, 1956, and May 5, 1956, from Vincent P. Brady to the TWA-IAM System Board of Adjustment, Kansas City, Missouri.

[3] Order dated May 14, 1956.

[4] Article XXVI(a).

[5] Letter of February 4, 1957, from Vincent P. Brady to the TWA-IAM System Board of Adjustment, Kansas City, Missouri.

[6] Letter of February 14, 1957, from the TWA-IAM System Board of Adjustment to Vincent P. Brady.

torney's fee, and 7. such other relief as the court would deem proper.

Defendant's original motions were ones under Fed. Rules Civ. Proc. rule 12(b), 28 U.S.C. to dismiss plaintiff's action for lack of jurisdiction of the court over the subject matter of the complaint and for failure to state a claim upon which relief can be granted. In the light of developments at oral argument, counsel for both defendants requested the court to treat their motions as ones for summary judgment under FR 56(b).

I.

The Railway Labor Act, 45 U.S.C.A. § 151 et seq., originally passed in 1926, was amended ten years later to embrace carriers by air.[7] A look at the early cases under the Act is helpful to pinpoint the issues here.

1. The leading case of the Supreme Court in this area is Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S. Ct. 754, 85 L.Ed. 1089. After discharge by the Illinois Central Railroad, Moore, an employee, refused the jurisdiction of the Adjustment Board, which had been set up as a board of review in 1934. Instead, he accepted his discharge as final and then brought suit in the state court for common law breach of contract. The action was transferred to the federal district court on diversity. When it reached the Supreme Court, it was held "petitioner was not required by the Railway Labor Act[8] to seek adjustment of his con-

[7] The complete story of the Act is available elsewhere. See Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency", 46 Yale L.J. 567, *et seq.*

[8] 45 U.S.C.A. § 153, First (i) provides:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall

troversy [with the railroad] as a prerequisite to suit for wrongful discharge." 312 U.S. 630, 636, 61 S. Ct. 754, 756. The Act, said the Court, did not require an administrative finding before the filing of suit, nor did it remove the jurisdiction of the courts to determine the controversy.

Subsequently, in Slocum v. Delaware, Lackawanna & Western R. Co., 339 U.S. 239, 70 S. Ct. 577, 94 L.Ed. 795, the Court, in denying the power of any court to invade the jurisdiction conferred on the Adjustment Board by the Act, specifically ruled the Moore case inapposite since interpretation there of a collective bargaining agreement provision had no binding effect on future interpretations by the Board. Thus it was held whereas the Adjustment Board had exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in Slocum, it did not have exclusive jurisdiction over the claim of an employee that he had been unlawfully discharged. The Moore case stood firm.

2. Although Moore came up on diversity of citizenship, no question arose of the employee's failure to exhaust remedies available under the employment contract when the state law of the forum required it. When it did, a host of problems were precipitated. Koppal, a discharged employee, bypassed, as Moore did, his right to an appeal before the Adjustment Board and elected to bring to the federal district court upon diversity, an action for wrongful discharge of employment. The jury returned a verdict for plaintiff, but after motion, the trial court set aside the verdict and dismissed the complaint, apparently impressed with the contention the administrative remedies

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be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

under the employment contract, which were comparable to those described in the Railway Labor Act, had not been exhausted by the plaintiff, as required by the state law of Missouri.

The Eighth Circuit reversed[9] on this ratio: The administrative adjustment of disputes did not have their source in or subject to appraisement on the basis of state law, but were questions relating solely to the federal Act; the nature of these provisions under the Act were settled by the Supreme Court in the Moore case, which was controlling. In the words of Judge Johnsen:

"In the face of the declaration and construction, Missouri would not, of course, be at liberty to hold contrarily that the adjustment provisions of a contract made under and pursuant to the Railway Labor Act were compulsory in nature and constituted conditions precedent to the right to sue for wrongful discharge in an employment relationship covered by the Act. Missouri law applicable to employment relationships under the Railway Labor Act, at least within the field of any matters regulated by the Act. So far as a suit for wrongful discharge is concerned, the administrative remedies prescribed by the Act and incorporated in a contract made under it would therefore have to be treated by the Missouri courts, for justiciable purposes in their forum, the same as a situation under Missouri law of a contract in which no administrative adjustment provisions were contained."[10]

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[9] Koppal v. Transcontinental & Western Air, Inc., 8 Cir., 199 F.2d 117.

[10] 199 F.2d at page 123.

The dissenting judge (Riddick, J.) concluded that exhaustion of remedies was a matter of substantive law which the forum could legitimately exact in a federal diversity case:

> "It is true that in the Moore case the Supreme Court said that the right of an employee to sue an employer for damages for breach of a collective bargaining agreement of employment was not dependent upon the prior exhaustion of the employee's administrative remedies under the Railway Labor Act. But to give that statement the meaning which the majority attribute to it is to lift it out of context and to to ignore the difference in character between rights and remedies available to an employee before the Adjustment Board under a contract made pursuant to the Railway Labor Act, and those available to him in a common law action for damages for breach of such a contract. * * * Since a proceeding under the Railway Labor Act before the Adjustment Board and an action at law in a District Court for damages for breach of contract are wholly different in character, assert different rights, and seek different remedies, in separate tribunals of mutually exclusive jurisdiction, it can not be said that before resorting to one action the litigant must first resort to the other. Where either action is available, the litigant has his choice. That is all the Moore case stands for. It certainly does not stand for the proposition that in an action for damages for breach of a Missouri contract, tried in a District Court in Missouri whose jurisdiction is based solely upon diversity of citizenship and the sum in controversy, the substantive law of Missouri is not controlling." [11]

3. The Supreme Court reversed the Court of Appeals and affirmed the District Court. Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed.

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[11] 199 F.2d at pages 126-127.

1325. In doing to, the Court's attention was drawn not to the impact of a federal act but to the demands of state substantive law. Thus, in the best tradition of Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, it was announced (per Mr. Justice Burton for the Court [with Mr. Justice Douglas dissenting]) 345 U.S. at page 662, 73 S.Ct. at page 910:

> "* * * if the applicable local law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so. Here respondent was employed by a carrier, subject to Title II of the Railway Labor Act, and his employment contract contained many administrative steps for his relief, all of which were consistent with that Act. Accordingly, while he was free to resort to the courts for relief, he was there required by the law of Missouri to show that he had exhausted the very administrative procedure contemplated by the Railway Labor Act. In the instant case, he was not able to do so and his complaint was properly dismissed."

The Moore case gave to the employee the legal right of choosing his course of relief—either the Adjustment Board or an independent action. Ostensibly, Koppal only conditioned the employee's legal right; in effect, it undermined it. The saving feature implied in Koppal, that the declared formality of exhaustion would in no way prejudice the employee in the bringing of an action, where that was his choice, proved almost worthless. Practical application of the Court's decision by the lower courts, exampled in Bower v. Eastern Airlines, Inc., 3 Cir., 214 F. 2d 623, became, for the discharged employee, a hazardous and even losing game.

4. Bower was discharged by his employer and, for reasons to be developed, appealed to the Adjustment Board. The appeal proved unavailing. Bower then brought an

action for wrongful discharge in the federal district court asserting diversity jurisdiction. The District Court dismissed the complaint, and the Third Circuit affirmed on the ground the appeal before the Board was a voluntary election, and, therefore, the Board's determination was "final and binding" under the provisions of the Railway Labor Act.[12] The Court (per Hastie, J.) wrote, 214 F. 2d at page 626:

"* * * Whether we say that the party is bound by his own voluntary election between an administrative

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[12] 45 U.S.C.A. § 184 provides, in part:

"The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier *designated to handle such disputes*; but, *failing* to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

"It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title."

45 U.S.C.A. § 153, First (m) provides:

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

and an alternative judicial remedy, or describe the party who initiated the administrative proceeding as estopped from denying its agreed final and binding character, or view this as an application of the rationale of *res judicata* in a new area, we are satisfied that the court should declare and enforce a rule of repose against the reexamination of the merits of plaintiff's claim in this case."

Bower raised the cry, expected, that the Koppal case necessitated the employee taking an administrative appeal before instituting suit, but the Court of Appeals disagreed. Koppal, like Moore, our Circuit said, "merely recognizes the duty of a federal court in a diversity action for wrongful termination of employment to require the plaintiff to show whatever exhaustion of administrative remedy may be prerequisite to suit under the procedural[13] law of the forum." Investigating the law of Pennsylvania, the Court could isolate nothing there to suggest a suit for wrongful termination of employment must be preceded by any administrative procedure beyond an unqualified dismissal that is not further reviewable within the employer's organization. Thus, it was judged, Bower did not have to obtain an Adjustment Board ruling on his contentions before invoking the jurisdiction of the district court. In short, on this question, Bower had misunderstood Koppal in thinking it required in every instance exhaustion of remedies, and, even had Bower correctly read Moore and Koppal on exhaustion, his move to go before the Board was binding on him because, as it turned out, Pennsylvania law did not in fact require it.[14]

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[13] The reference to "procedural" is not altogether squared with either the language of the dissenting opinion of the Court of Appeals in Koppal, *supra* note 11, or the language of the majority opinion of the Supreme Court in 345 U.S. 653, at pages 656-657, 73 S.Ct. 906, at pages 907-908.

[14] See, on this score, the dissent of Judge Brown in Sigfred v. Pan American World Airways, Inc., 5 Cir., 230 F.2d 13, 19 *et seq.*

5. Although the freely chosen alternative, stated in Moore and undisturbed in Slocum, has been impeded under Koppal,[15] the employee is not entirely on the defensive for this attitude has unleashed possibly new devices, equally undesirable. In those states unmistakenly requiring the exhaustion of remedies under the employment contract, the employee is awarded more than the alternative Moore intended to give him. He cannot only go before the Adjustment Board for reinstatement, but, if unsuccessful, thereafter bring suit for wrongful discharge asserting he looked to the Board only in deference to the niceties of state law, citing the authority of the Supreme Court in Koppal. Absent state requirement, he is bound to make a choice.

Whereas the discharged employee should be guided by simple procedures geared to the sensitivities of his hardship, in reality he has been subjected to the rigors of a guessing game. The difficulty is that the decision of the Supreme Court in Moore and its holding in Koppal are, when served, barely digestible in the same system. Beyond that, it may be asked whether the law has removed itself

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[15] Most recent is a decision of the Supreme Court in Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed. 2d 622. The issue was whether a railway labor organization can resort to a strike over matters pending before the Adjustment Board. In holding it could not, the present Chief Justice, speaking for a unanimous eight-man court, asserted the Railway Labor Act, and specifically 45 U.S.C.A. § 153, First (i) and (m), *supra*, notes 8 and 12, literally means what it says—that a dispute may be referred to the appropriate Adjustment Board at the election of either party, in either which case the Board's decision becomes final and binding upon all parties concerned. (The Court went on to hold that the District Court had jurisdiction for injunctive relief notwithstanding the provisions of the Norris-LaGuardia Act, 29 U.S.C.A. §§ 101, 115). This fresh discussion, as applied here—that is, the effect of the carrier, not the aggrieved employee, invoking the jurisdiction of the Board on the apparent ability of the employee to maintain his independent action—could mean new barriers for the employee to cross.

from the arena of common sense by adopting in the upper reaches an unrealistic approach. To put the Socratic question, does the employee who has been discharged, being thus of an uneven mind—hounded by the realization of loss of job and support for his family for an indefinite period; overwhelmed by the bigness of Organization—Union, Carrier—seemingly, and even actually, banded against him;[16] pressured by the increasing awareness he has so little time to act to seek job restoration;[17] and induced by the thought the Adjustment Board is the quickest, and even sole, means of doing so—grasp for relief almost blindly ignorant in most cases of his legal position? In any event, if indeed, a choice must be made, is that the selective and measured act for which he is later to be judged and refused admittance in the court house door?

II.

1. Facts of the case at bar do not quickly fall into any of the slots discussed. However, certain avenues, referred to in Bower, have been left open for the employee to exploit even after appeal adversely to the Adjustment Board.[18] It is toward these ends that plaintiff is moving. His contentions in attacking these motions are that because of a provision of the employment contract, Brady was deprived of a freely decided election to which he was entitled, and because of the alleged fraud perpetrated upon Brady and

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[16] Collective bargaining agreements usually provide, as does the agreement in the case at bar between TWA and IAM, *supra* note 4, that good standing in the union is a condition of employment with the carrier.

[17] Three days in the case at bar. Article XXVI(f) of the TWA-IAM Agreement, *infra* the text of this opinion.

[18] Described in these terms: "This does not foreclose the consideration of questions of jurisdiction or of the essential fairness of the administrative proceeding, even when these issues are raised collaterally." Bower v. Eastern Airlines, Inc., 3 Cir., 214 F. 2d 623, 626.

the Board of Adjustment their proceedings were robbed of essential fairness. Therefore, it is urged this court has the power to review the merits of plaintiff's case, reverse or affirm the Board's decision, and grant or deny the further relief requested in the complaint.

2. I first take up the question of whether Brady was deprived of his right to free selection as between appeal to the Adjustment Board and an independent action, since it may be dispositive of many entangling issues involved. This is in line with the permissive area of review defined by the Third Circuit in the Bower case.

Plaintiff refers to Article XXVI(f) of the TWA-IAM Agreement, which provides:

> "If the employee discharged or to be discharged under this Article contends that he is not properly subject to discharge under the terms of this Article, he may protest such action to the TWA-IAM System Board of Adjustment provided that such protest in writing is mailed to the Board within three (3) days after the date the employee is notified of such action. This protest shall be submitted in duplicate to the Chairman, TWA-IAM System Board of Adjustment, with one copy to be mailed in care of the Vice-President of Industrial Relations, TWA, Room 207 Administration Building, Municipal Airport, Kansas City, Missouri, and the other copy to be mailed in care of the General Chairman, IAM, Room 1019 Rialto Building, Kansas City, Missouri. Both copies shall be sent by registered mail, return receipt requested. The date of receipt of such written protest by the party with the representative who is Chairman of the System Board of Adjustment shall be considered as the date of receipt of the protest by the Board. *In the event no protest is so filed within the above time limits, the action will be considered as proper and will be final*

and binding upon all parties concerned. Within five (5) days of receipt of such a protest, the System Board of Adjustment will meet and consider the dispute * * *." (Italics supplied.)

Since the agreement was made and entered into in accordance with the provisions of the Railway Labor Act, as amended, the policy declared therein is paramount. From a plain reading of Article XXVI(f) it is evident that if a discharged employee filed no protest with the System Board of Adjustment, his discharge would, by virtue of his failure, be conclusive upon him. Such a provision is a far cry from what the Supreme Court held in the Moore case and reaffirmed in Koppal as to the solidarity of the employee's position. In the eyes of Brady, any discharged employee, it could do no other but mislead. I find the effect of Article XXVI(f) of the TWA-IAM Agreement entirely vitiated the freedom of action to which the discharged employee was entitled in choosing his course.[19] While the fact that Brady did expressly condition his ap-

[19] Indicative of the confusion engendered even to parties familiar with the procedural aspects of an appeal is the situation in the case at bar. Formal notification of discharge did not reach Brady until May 4, 1956. The Agreement provides, in Article XXVI(f), that the protest must be mailed to the System Board of Adjustment within three days thereof, and that hearing must be held within five days after receipt. Brady, by letter of April 24, 1956, to the Board requested an appeal. The Chairman of the Board replied by letter of April 30, 1956, in which he set May 4, 1956, as the date for hearing. After presentation of all the evidence at the hearing on that date (the hearing was centrally located for employees—Kansas City, Missouri) the Board ruled that since Brady did not receive formal notification of discharge until May 4, 1956, his request for appeal of April 24, 1956, was premature. Consequently, Brady was obliged to write again to the Adjustment Board within three days of May 4, 1956. He did so by letter of May 5, 1956, which was received on May 9, 1956, thus necessitating a hearing on or before May 15, 1956. A hearing was held on May 14, 1956. Brady was discharged on May 15, 1956.

peal to the Adjustment Board[20] does not thereby reserve any rights to him, as plaintiff has argued, it does indicate the existence of a coercive force operating on the discharged employee's free selection of alternatives and his own meager effort to counteract that force. Consequently, a free election must be deemed as being nullified under these circumstances.[21]

3. It thus remains to determine where plaintiff now stands in this suit. No case is known to this court in which a ruling of an Adjustment Board has been stricken down on the grounds left to us in the Bower case. However, in view of the nature of the cause, it can only be that the appeal by the discharged employee to the System Board of Adjustment must be considered as never having been entered at all. Plaintiff's position, therefore, with respect to the allegations of fraud and all other matters bearing on the decision of the Board, is bypassed. Brady will be given the opportunity to elect he never had.

Whether plaintiff chooses to pursue his appeal to the Board, or to commence an independent action is a decision left, of course, to him. It is noted, however, that should he start suit for wrongful discharge in the state court of Delaware, he must be prepared to meet the challenge of exhausting remedies, if Delaware so requires, as heretofore discussed; if he should elect to sue in federal court, the usual jurisdictional requirements must be satisfied.

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[20] Letters of April 24, 1956, and May 5, 1956, from Vincent P. Brady to the TWA-IAM System Board of Adjustment, Kansas City, Missouri.

[21] The importance of adhering to Article XXVI(f) was stressed by the Adjustment Board itself in its ruling of May 4, 1956, which found the appeal at that time not properly before it and granted additional time to Brady to perfect it. Said the Board: "The Board calls your attention to Article XXVI(f) 'In the event no protest is so filed within the above time limits, the action (discharge) will be considered as proper and will be final and binding upon all parties concerned.' "

4. Defendants' motions are denied. I will entertain an order not inconsistent with this opinion either staying this action or dismissing it without prejudice, the date from which plaintiff has, in accordance with the provisions of the TWA-IAM Agreement, three days to select his forum.

Plaintiff submit order.

* * * * * * * * * *

Vincent P. Brady, *Plaintiff,*

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and The International Association of Machinists, an unincorporated association, *Defendants.*

Civ. A. 1884.

United States District Court

D. Delaware.

Oct. 28, 1958—167 F. Supp. 469

* * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

[1] This matter is before the court on reargument of the decision rendered in Brady v. Trans World Airlines, Inc.,[1] directed primarily to the impact the recent Supreme Court pronouncement in Conley v. Gibson[2] had upon the Brady determination. Consenting to rehear counsel is a proper exercise of this court's discretion since Judge Leahy, the author of the Brady decision, by reason of retirement was "unavailable" within the purview of United

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[1] D.C. Del. 1957, 156 F. Supp. 82.

[2] Conley v. Gibson, 1957, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

States v. Wheeler.[3] It is, however, with a great deal of restraint and deference that reargument has been ordered in view of Judge Leahy's able opinion.

The issues raised by the parties have been exhaustively explored and for purposes of delineation will be briefly set forth and considered seriatim:

I. Does the System Board of Adjustment (Board) have jurisdiction over the premises?

II. Assuming (I) is answered in the negative, what is the scope of federal jurisdiction absent diversity of citizenship?

III. Has a federal cause of action been properly pleaded?

I

[2] The initial inquiry pertaining to jurisdiction of the Board is resolved by Conley v. Gibson.[4] There the Supreme Court precisely stated:[5]

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[3] 3 Cir., 1958, 256 F. 2d 745, 747.

> "* * * We pointed out that other exceptional circumstances of unavailability of the first judge would be if he had died or resigned; it was obvious in these situations that if the petition for reconsideration were to be heard at all, it would have to be by another judge."

It is important to note that no order was entered by Judge Leahy.

[4] Note 2, supra. See also Hargrove v. Brotherhood of Locomotive Engineers, D.C. 1953, 116 F. Supp. 3; Brotherhood of Railroad Trainmen v. Luckie, Tex. Civ. App. 1955, 286 S.W. 2d 712; Rose, The Railway Labor Act and the Jurisdiction of the Courts, 8 Lab. L.J. 9 (1957).

[5] 1957, 355 U.S. 41, 44, 78 S. Ct. 99, 101, 2 L. Ed. 2d 80. § 3 First (i) of the Railway Labor Act (45 U.S.C.A. § 153) has no application to carriers by air (Title II, § 201, 45 U.S.C.A. § 181), however, the identical language herein pertinent is found in Title II, § 204, first par. (45 U.S.C.A. § 184):

> "The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances,

"We hold that it was error for the courts below to dismiss the complaint for lack of jurisdiction. They took the position that § 3 First (i) of the Railway Labor Act conferred exclusive jurisdiction on the Adjustment Board because the case, in their view, involved the interpretation and application of the collective bargaining agreement. But § 3 First (i) by its own terms applies only to 'disputes between an employee or group of employees and a carrier or carriers.' This case involves no dispute between employee and employer but to the contrary is a suit by employees against the bargaining agent to enforce their statutory right not to be unfairly discriminated against by it in bargaining."

Although plaintiff's complaint leaves much to be desired, it is clearly discernible that plaintiff's controversy is with his bargaining agent and not employer, notwithstanding that the employer is joined in the action to accord complete relief. The series of events noted in Judge Leahy's opinion disclose that the Board heard the case and rendered its verdict prior to Brady's dismissal.[6] Thus the Board

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or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, * * * shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes."

Thus it is apparent that the Conley construction of § 3 First (i) Title I has similar application to Title II § 204 ¶ 1 (45 U.S.C.A. § 184).

[6] "* * * On May 14, 1956, the Board decided adversely to Brady. On May 15, 1956, he was discharged from employment by TWA pursuant to the collective bargaining agreement between TWA and IAM which required good standing membership in the union as a condition of employment." 156 F. Supp. 82, 83.

could only have determined Brady's claim vis-a-vis the Brotherhood.[7]

[3] The fact that the dispute might encompass construction of the collective bargaining agreement is deemed entirely irrelevant for unless the controversy is between employee and employer the Board is simply without jurisdiction[8] and no agreement of the parties can extend its authority.[9]

The court in resolving this issue is not unmindful of the caveat noted in United Railroad Operating Crafts v. Wyer, namely, " * * * it is a fantastic thought that every employee who is discharged under a union shop agreement can run to Court about it."[10] This argument was effectively rebutted in 8 Lab.L.J. at page 69:

> " * * * The district court's (Wyer Court) indifference to the rights of the workers is shocking for it

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[7] See 8 Lab. L.J. at page 59:

> "However, if it is the situation where a hearing shows to the employer's satisfaction that the employee is not a member of the union, and the employer acquiesces in the union's demand, the dispute is not between the employee and the carrier, but between the employee and the union which is disputing his membership and pressing for the discharge. The union shop contract is solely for the advantage of the union and, in all probability, the employer would do nothing about discharging the allegedly delinquent employee until prodded by the union."

[8] 45 U.S.C.A. § 184: "The disputes between an employee or group of employees and a carrier or carriers by air * * *."

[9] "The authority or jurisdiction of the System Board is statutory, 45 U.S.C.A. § 184. It cannot be extended by agreement of the parties, for it is not a private board of arbitration." American Airlines v. Air Line Pilots Ass'n, D.C.E.D.N.Y. 1950, 91 F. Supp. 629, 632.

[10] United Railroad Operating Crafts v. Wyer. D.C.S.D.N.Y. 1953, 115 F. Supp. 359, 365.

> further said that 'it is a fantastic thought that every employee who is discharged under a union shop agreement can run to court about it.'
>
> "If it is a violation of the statute, why is it fantastic? Since when have the courts become so much more important than the citizens whose rights they must redress? Has the court become callous as to the worker's rights? Possibly these cases will make the reader wonder." (Parenthesis supplied.)

Nor is the court impervious to the advantages derived from having expertise and uniformity in the resolution of labor matters especially where the determination involves future conduct.[11] It is not thought, however, that denial of Board jurisdiction in the instant proceeding will tend to foment labor strife.[12]

Of the policy to be served the most persuasive argument is that which attacks the Board under the factual setting herein presented for the inherent bias engendered by its composition of members representing exclusively management and union. Article XII(b) of the TWA-IAM collective bargaining agreement provides:

> "The System Board of Adjustment shall consist of four (4) members, two (2) selected by the Company and two (2) selected by the Union."

It is simply repugnant to our standards of fundamental fairness and totally unrealistic to require an employee to submit a dispute he has with his bargaining agent for final determination to persons selected by and represent-

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[11] Slocum v. Delaware, L. & W. R. Co., 1950, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795. Alabaugh v. Baltimore & Ohio R. Co., 4 Cir., 1955, 222 F. 2d 861.

[12] Note 11, supra.

ing the bargaining agent. The decisional law and the legal literature are replete with condemnation of this practice.[13]

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[13] " • • • Indeed, it might be difficult to find a constitutional basis for relegating this controversy to the Railway Adjustment Board as contended by defendants, and such procedure appears particularly abhorrent when it is considered that the defendants named herein participate in making the selections of membership on the Board, who would pass upon the validity of their acts charged to be in disregard of the trust imposed upon them." Hargrove v. Brotherhood of Locomotive Engineers, D.C. 1953, 116 F. Supp. 3, 9.

"• • • We can only answer that in that event there is a public interest in the impartial protection of any rights granted by an Act of Congress that transcends the immunity of labor disputes from all surveillance by a court of law." Rychlik v. Pennsylvania R. Co., 2 Cir., 1956, 229 F. 2d 171, 175, reversed on other grounds, 1957, 352 U.S. 480, 77 S. Ct. 421, 1 L. Ed. 2d 480.

In Dr. Bonham's Case, 8 Co. Rep. 114a, 2 Brownl. 255, 77 Eng. Rep. 647 (C.P. 1610), the defendant was fined by the President and Censors of the Royal College of Physicians, pursuant to a statute, for practicing medicine without a proper license. The statute gave half the fine to the Royal College of Physicians. In holding this fine invalid Lord Coke said:

> " • • • The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem suae rei esse judicem*; and one cannot be Judge and attorney for any of the parties, • • •. And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void; • • • •."

See also Steele v. Louisville & Nashville R. Co., 1944, 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed. 173; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 1944, 323 U.S. 210, 65 S. Ct. 235, 89 L. Ed. 187; Tumey v. State of Ohio, 1927, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749; Edwards v. Capital Airlines, 1949, 84 U.S.

II and III

[4] Unfortunately, concluding that the Board lacked authority to determine Brady's claim does not materially advance the jurisdictional inquiry for plaintiff seeks more than simply upsetting the Board's judgment.[14] Since diversity of citizenship is lacking the additional relief requested can only be accorded in this forum if a cause of action correctly invoking 28 U.S.C.A. § 1331 or § 1337 has been asserted.

The claim as it now reads, resolving all doubts in favor of the pleader, is in need of amendment for it is seriously

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App. D.C. 346, 176 F. 2d 755, certiorari denied 338 U.S. 885, 70 S. Ct. 186, 188, 94 L. Ed. 543; Brotherhood of Railroad Trainmen v. Luckie, Tex. Civ. App. 1955, 286 S.W. 2d 712; Rose, Railway Labor Act and Jurisdiction of the Courts, 8 Lab. L.J. 9 (1957); 40 Harv. L. Rev. 30 (1926).

[14] Complaint, pp. 6-7:

"Wherefore, plaintiff seeks the following relief:

"I. An order of this Court reversing the decision of the SBA, dated May 14, 1956.

"II. An order directing TWA to reinstate Brady as an employee with payment to him of all wages, overtime pay and vacation pay since May 15, 1956, with reinstatement of Brady to all other benefits he held as an employee of TWA including the $15,000.00 life insurance policy, the sickness and benefit policy, credit union privileges, retirement benefits and his seniority status retroactive to October 1, 1946 undiminished by the time since May 15, 1956.

"III. A judgment against IAM and/or TWA for damages for the humiliation and embarrassment suffered by Brady by reason of his illegal discharge.

"IV. A judgment for damages suffered by Brady by reason of the discharge without just cause by TWA.

"V. The allowance of a reasonable attorney's fee which shall be taxed and collected as a part of the costs of this suit.

"VI. Such other, further and different relief as the Court may deem just and proper in the premises."

questioned whether little more than an action sounding ex delicto or ex contractu has been formulated.[15] At oral argument plaintiff expressly requested permission to assert by amended complaint conduct which would set forth a cause within the purview of Conley.[16]

The court subscribes to plaintiff's contention that Conley v. Gibson[17] should not be limited to its facts but encompasses all forms of discrimination whether it be racial or not. The case law which has attempted to limit redress in federal courts to racial discrimination[18] is less persuasive to this court than the decisions and literature which oppose the placing of an arbitrary restriction.[19] There is no justifiable reason without invoking constitutional mandates to so limit federal relief where predicated solely on a federal statute.[20] In Hargrove v. Brotherhood of Loco-

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[15] Brock v. Brotherhood of Sleeping Car Porters, D.C.W.D.La. 1955, 129 F.Supp. 849.

[16] Note 2, *supra*.

[17] Note 2, *supra*.

[18] Alabaugh v. Baltimore & Ohio R. Co., 4 Cir., 1955, 222 F.2d 861; Spires v. Southern Ry. Co., 4 Cir., 1953, 204 F.2d 453; Colbert v. Brotherhood of Railroad Trainmen, 9 Cir., 1953, 206 F.2d 9, certiorari denied, 1954, 346 U.S. 931, 74 S.Ct. 320, 98 L.Ed. 422.

[19] Ford Motor Co. v. Huffman, 1953, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048; Mount v. Grand International Brotherhood of Locomotive Engineers, 6 Cir., 1955, 226 F.2d 604, certiorari denied, 1956, 350 U.S. 967, 76 S.Ct. 436, 100 L.Ed. 839; Hargrove v. Brotherhood of Locomotive Engineers, D.C.1953, 116 F.Supp. 3; 8 Lab.L.J. 9 (1957); see also dissenting opinion in Brotherhood of Railroad Trainmen v. Howard, 1052, 343 U.S. 768, at page 776, 72 S.Ct. 1022, at page 1026, 96 L.Ed. 1283.

> "* * * It would have been the same if the Brotherhood had discriminated against him on some other ground, unrelated to race. It was the Brotherhood's duty 'to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent.'"

[20] Steele v. Louisville & Nashville R. Co., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173.

motive Engineers the language of Judge Pine is particularly appropriate and is in the court's estimation, a complete answer to any attempt to restrict court supervision of the RLA to racial discrimination: [21]

> "Although the Steele and related cases involved racial discrimination, an analysis of the opinions makes it clear that jurisdiction of the courts was not dependent on that element exclusively, but related to their power to determine whether or not the statutory duty to represent all of the employees equally had been met. Compare Ford Motor Co. v. Huffman, 345 U.S. 330 [73 S.Ct. 681, 97 L.Ed. 1048] where no racial question was involved."

Further the court is of the opinion that the authority cited by defendants for the proposition that the bargaining agent's responsibilty is merely to refrain from executing agreements unlawful on their face, in terms or effect[22] directly conflicts with the language of Conley stated below: [23]

> "* * * A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory as against some members of the bargaining unit."

Thus little weight and consideration have been afforded these decisions for it is fair to infer from the aforemen-

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[21] D.C., 116 F.Supp. 3, 9. See also discussion of the Hargrove decision in Brotherhood of Railroad Trainmen v. Luckie, Tex.Civ. App.1955, 286 S.W.2d 712, 716.

[22] Hettenbaugh v. Airline Pilots Ass'n International 5 Cir., 1951, 189 F.2d 319; United R.R. Operating Crafts v. Northern Pacific Ry. Co., 9 Cir., 1953, 208 F.2d 135, certiorari denied 347 U.S. 929, 74 S.Ct. 529, 98 L.Ed. 1081.

[23] 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80.

tioned quotation that discriminatory practices in administering the bargaining agreement are federally condemned.[24]

Accordingly, plaintiff is granted leave to amend pursuant to the course indicated at oral argument. TWA will be retained as a party defendant as a precautionary measure to insure plaintiff complete relief in the event he sustains his burden.[25] In view of the foregoing, there is no substance to defendant TWA's contention that the complaint is deficient for non-joinder of the System Board of Adjustment.

An order may be submitted.

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[24] Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; see also Richardson v. Texas & New Orleans R. Co., 5 Cir., 1957, 242 F.2d 230.

[25] Richardson v. Texas & New Orleans R. Co., 5 Cir., 1957, 242 F.2d 230. Article XXVI (p) of the TWA-IAM agreement is further reason for not dismissing TWA as a party defendant:

> "The Union shall indemnify and save the Company harmless against all forms of liability that shall arise out of or by reason of action taken by the Company, which action was requested by the Union under the provisions of this Article (Union Security)." (Parenthesis supplied).

Vincent P. Brady, *Plaintiff,*

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and The International Association of Machinists, an unincorporated association, *Defendants.*

Civ. A. No. 1884.

United States District Court
D. Delaware.

June 10, 1959—174 F. Supp. 360

* * * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

This matter is before the court on defendant, The International Association of Machinists' (IAM) motion to dismiss the Second Amended Complaint "on the grounds that (1) the Court lacks jurisdiction over the subject-matter of the Complaint, as amended; and (2) the Complaint, as amended, fails to state a claim upon which relief can be granted." Diversity of citizenship does not exist.

Plaintiff's essential allegations of fact are:[1]

> "Brady was *not* delinquent in the payment of his dues. He tendered his dues in time to avoid being held delinquent by the IAM. His tender of dues was refused. The IAM's refusal to accept his dues is unexplainable except on the basis that it wanted to

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[1] Plaintiff's Brief in Opposition to Motion to Dismiss Second Amended Complaint, pp. 5-6.

"* * * Brady brings this action pursuant to the provisions of the United States Code, Title 45, Chapter 8, and more particularly Title II, Section 201 and Title I, Section 2 of the Railway Labor Act, to the extent the provisions of Title I, Section 2 are made applicable by Title II, Section 201, the aforesaid sections also being known as 45 U.S.C. [§§] 181 and 152, and pursuant to the provisions of 28 U.S.C. Section 1331 and 1337." Second Amended Complaint, par. 18.

be rid of Brady. Despite Brady's timely tender of dues, the IAM before the SBA and previously in this Court claimed that Brady was delinquent. * * * The discrimination against Brady was the fact that the IAM refused to accept tender of his dues which was not the attitude the IAM took with respect to other members of Brady's Local 1776. Not content with discriminating against Brady by refusing to accept his dues, the IAM thereafter 'pulled out all stops' in an effort to have Brady discharged. The tack the IAM took was to claim that he had not paid dues (misrepresenting the fact). The action which the IAM took against Brady under its claim that he had not paid dues was action which the union did not take against other members of Local 1776, who were, in fact, delinquent in the payment of their dues. The purpose of Brady's allegation (and what he believes the proof in this case will show) is that the IAM made out a fictitious case against Brady using a 'test', which test the IAM itself was unwilling to apply to other members of the IAM Local. Thus, the discrimination."

A perusal of the aforementioned contentions indicates that plaintiff sets forth two distinct claims, namely:

(1) Plaintiff was discharged in violation of 45 U.S.C.A. § 152.[2]

(2) The Brotherhood's discriminatory actions in causing plaintiff's discharge constitute a breach of the bargaining representative's duty under the Railway Labor Act to represent all members of the craft fairly without discrimination.[3]

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[2] This section is made applicable to Carriers by Air, 45 U.S.C.A. § 181.

[3] Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; Steel v. Louisville & Nashville R. Co., 1944, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173; Tunstall v. Brotherhood of Locomotive Firemen

[1] The court holds plaintiff's averments re discrimination are sufficient to bring him within the purview of this court's adjudication filed October 28, 1958.[4]

[2] The bargaining representative's statutory duty "to represent fairly and without hostile discrimination all of the employees in the bargaining unit", and "not to draw 'irrelevant and invidious' distinctions among those it represents"[5] clearly proscribes arbitrary invocations of union security provisions to reprimand the membership.[6] If inaction be interdicted[7] manifestly affirmative discriminatory conduct cannot be countenanced.

[3] Plaintiff's claim that he was discharged in violation of 45 U.S.C.A. § 152, particularly Section 152, Eleventh (a), raises a serious question of statutory construction. This provision in pertinent part provides:

& Enginemen, 1944, 323 U.S. 210, 65 S. Ct. 235, 89 L.Ed. 187. Brady v. TWA, D.C.Del.1958, 167 F.Supp. 469; Cherico v. Brotherhood of Railroad Trainmen. D.C.S.D.N.Y.1958. 167 F.Supp. 635; Vol. 2 U.S.Code Congressional Service, 81st Congress, 2d Session 1950, p. 4322: "Your committee also desires to make it clear that nothing in this bill [S. 3295] is intended to modify in any way the requirement that the authorized bargaining representative shall represent all the employees in the craft or class, including non-union employees as well as members of the union, fairly, equitably, and in good faith. (See Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192, 65 S. Ct. 226, 89 L.Ed. 173, and Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187)."

[4] Brady v. TWA, *supra.*

[5] Conley v. Gibson, 1957, 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80.

[6] "If the unions are to represent all of its members equitably, it breaches its duty if it discriminates against an individual as well as against a class or a recognized minority group." Cherico v. Brotherhood of Railroad Trainmen, D.C.S.D.N.Y.1958, 167 F.Supp. 625, 637.

[7] Note 5, *supra.*

"Eleventh. Notwithstanding any other provisions of this chapter, * * * any carrier or carriers * * * and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

Defendant submits that the proviso language of the enactment merely declares illegal agreements which, on their face, do not conform to the statute. Thus, under defendant IAM's view, so long as the collective bargaining agreement is couched in terms of the Act, conduct under any circumstance, cannot give rise to a federally cognizable claim.

Although the proviso does appear to speak of "no agreement shall" to adopt defendant IAM's construction and so limit its application, would render the provision impotent. The Conley court rejected the identical argument where it was urged as limiting the duty of the bargaining agent to

refrain from negotiating agreements discriminatory in terms and/or effect. Mr. Justice Black cogently observed: [8]

> "* * * A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit." [355 U.S. 41, 78 S.Ct. 102.]

The legislative history makes it crystal clear that if an employee be expelled from membership for any reason other "than his failure to tender the uniformly required periodic dues, initiation fees, and assessments, he cannot be required to relinquish his job because of his failure to join or remain a member of a labor organization." [9] Defendant asserts that the court is precluded from resorting to statements evidencing the policy bottoming the proviso without demonstrating that the statutory language is ambiguous.

45 U.S.C.A. § 152, Eleven (a) not unlike other provisions of the Railway Labor Act is incapable of literal application.[10] For instance, the section as worded suggests the

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[8] Note 5, *supra.*

[9] Vol. 2 U.S.Code Congressional Service, 81st Congress, 2d Session 1950, p. 4322.

[10] Pennsylvania R. Co. v. Rychlik, 1957, 352 U.S. 480, 488-489, 77 S.Ct. 421, 425, 1 L.Ed.2d 480:

> "At first glance the language of Section 2, Eleventh (c) would appear to be disarmingly clear: union-shop contracts are satisfied if the employee belongs to any union which happens to be national in scope and organized in accordance with the Act. And if that be its meaning we would then have to deal with the questions reached by the Court of Appeals. However, as so often happens, when the language of the statute is read, not in a vacuum, but in the light of the policies this Section was intended to serve, it becomes clear that the purpose of Congress was not, as respondent contends, to give employees in the railroad industry any blanket right to join

anomalous result that a member may not be discharged for failing to maintain membership but only for failing to acquire membership.[11] Manifestly the drafters could not have intended the aforementioned construction; neither could they have purposed the interpretation placed upon the second proviso by defendant.[12]

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unions other than the authorized bargaining representative, or to help dissident or arising new unions recruit new members. Rather, the sole aim of the provision was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members employment security, even if a member should be working temporarily in a craft for which another union is the bargaining representative. * * *"

[11] Compare 45 U.S.C.A. § 152 Eleventh (a):

"(a) to make agreements, requiring, *as a condition of continued employment,* that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class * * *." (Emphasis supplied.)

with first clause of TWA-IAM agreement, Article XXVI:

"Each employee now or hereafter employed in any work covered by this Agreement shall, as a condition of continued employment in such work, within sixty (60) days following the beginning of such employment or the effective date of this Article, whichever is later, become a member of, and thereafter maintain *membership in good standing* * * *." (Emphasis supplied.)

[12] United States v. Shirley, 359 U.S. 255, 79 S.Ct. 746, 749, 3 L.Ed.2d 789:

"Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.' United States v. Whitridge, 197 U.S. 135, 143, 25 S.Ct. 406, 408, 49 L.Ed. 696. This is so because the purpose of an enactment is embedded in its words even though it is not always pedantically expressed in words.

The 1951 amendment permitting carriers and employee representatives to bargain for union security, discloses that the sole requirement the bargaining agent could extract from its members as a condition of continued employment was the tender of "periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." [13]

[4, 5] An employee whose discharge is precipitated by a union covered under the provisions of the Railway Labor Act for reasons other than enunciated in the statute, absent Congressional preemption,[14] may have recourse to a federal court. To hold otherwise would be a perversion of the general statutory scheme and defeat entirely the declared purposes of Congress.[15]

See United States v. Wurzbach, 280 U.S. 396, 399, 50 S.Ct. 167, 74 L.Ed. 508. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, see United States v. Johnson, 221 U.S. 488, 496, 31 S.Ct. 627, 55 L.Ed. 823, or, as Judge Learned Hand has somewhere put it, the art of interpretation is 'the proliferation of purpose.' * * *"

[13] 45 U.S.C.A. § 152, Eleventh (a).

[14] The instant proceeding is not one in which a System Board of Adjustment created pursuant to 45 U.S.C.A. § 184 has jurisdiction. Brady v. TWA, D.C.Del.1958, 167 F.Supp. 469. See also Felter v. Southern Pacific Co., 1959, 359 U.S. 326, 79 S.Ct. 847, 3 L.Ed.2d 854; Conley v. Gibson, supra; Cunningham v. Erie R. Co., 2 Cir., 1959, 266 F.2d 411.

[15] Vol. 2, U.S.Code Congressional Service, 81st Congress 2d Session 1950, pp. 4321-4322:

"* * * The proposal was made by Senator Lehman that your committee's intention be made clear that such employees were not to be deprived of their employment as a result of the exercise of the right extended by this bill. Your committee desires to make it clear that the proviso clauses in paragraph eleventh (a) are designed to protect such employees; thus if an employee is denied membership or is eligible for membership only on terms and conditions not generally applicable to other mem-

Prior to the 1951 amendment an employee could not be discharged at the request of the certified bargaining agent for failing to retain union membership.[16] No language in 45 U.S.C.A. § 152, Eleventh (a) permitting a carefully circumscribed form of union security indicates that Congress intended to deprive the federal courts of actions based upon allegations that a union member was certified for discharge by his bargaining agent, notwithstanding he had fulfilled his financial obligation to the brotherhood.

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bers, he cannot be requested to give up his job because of his failure to join a labor organization. Furthermore, if membership is denied or if an employee is expelled from membership for any reason other than his failure to tender the uniformly required periodic dues, initiation fees, and assessments, he cannot be required to relinquish his job because of his failure to join or remain a member of a labor organization. * * *"

"* * * It is the view of your committee that the terms of S. 3295 are substantially the same as those of the Labor-Management Relations Act as they have been administered and that such differences as exist are warranted either by experience or by special conditions existing among employees of our railroads and airlines." *Vol. 2 U.S. Congressional Service, 81st* Congress, 2d Session 1950, p. 4321.

Compare 29 U.S.C.A. § 158(a) (3):

"* * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization, * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

[16] Vol. 2 U.S. Congressional Service, 81st Cong., 2d Sess., pp. 4319-4321; 45 U.S.C.A. § 152, Fifth. See also Pennsylvania R. Co. v. Rychlik, 1957, 352 U.S. 480, 489, 77 S.Ct. 421, 1 L.Ed.2d 480. "* * * It is true that at the time of its passage in 1951 Subsection Fifth of § 152 made it unlawful for a railway to require an employee to join any union as a condition of employment, and we may assume, arguendo, that that subsection still forbids a 'closed shop.' * * *" Otten v. Baltimore & Ohio R. Co., 2 Cir., 1953, 205 F.2d 58, 60.

There remains for consideration a third source of federal jurisdiction, namely, the union security provision of the collective bargaining agreement violates the second proviso of 45 U.S.C.A. § 152, Eleventh (a). The contractual provision in pertinent part provides:[17]

> "(a) Each employee now or hereafter employed in any work covered by this agreement shall, as a condition of continued employment in such work, within sixty (60) days following the beginning of such employment or the effective date of this Article, whichever is later, become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise herein. Such condition shall not apply * * * with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership.
>
> "For the purpose of this Article, 'membership in good standing in the Union' shall consist of the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month, which are uniformly required of members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership.
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> * * * * * * * * *
>
> "(e) When an employee becomes delinquent by not meeting the requirements of (a) above for 'membership in good standing in the Union', the following procedure shall be observed:

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[17] TWA-IAM agreement, effective March 11, 1955, Article XXVI, pp. 62, 63, 67.

"(1) The General Chairman of the Union shall notify the employee by registered letter, return receipt requested, copy to the Company's Vice President of Industrial Relations, that the employee is delinquent in the payment of dues as specified herein and accordingly is subject to discharge as an employee of the Company. * * *

* * * * * * * * * *

"(n) Whenever the term dues is referred to in this Article, such use of the word 'dues' shall include initiation or reinstatement fees, periodic dues, and assessments (not including fines and penalties), * * *."

The definition of membership in good standing set forth in the above-quoted Article as "the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month" does not seem to conform with Article E, Section 14 of the IAM constitution which in essence provides for a three month grace period.[18] At one stage of the proceedings counsel for defendant conceded the variance:[19]

"Now, the way he gets that is this: *The union shop agreement itself provides that a member shall be in good standing if he is not delinquent for more than one month. In other words, the union shop agreement provision is stronger than what is in the union laws.* People can be members of the union in places where they do not have a union shop, and they would not be affected the same way. But it says one month. Then it has a provision in it that says that that delinquency of one month can be met up until the end of the next calendar month.

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[18] International Association of Machinists Constitution, Article E, Sec. 14.

[19] Transcript of proceedings April 21, 1958, Argument pp. 39-40.

"So as far as the wording of the union shop agreement itself is concerned—suppose the plaintiff had only been delinquent for February, he would have nearly had up until the end of March to meet his delinquency. And if that was what we were talking about, then his argument would be a good argument. However, that was not what Mr. Miller replied to him. *What Mr. Miller replied to him, which was more generous than what was in the union shop agreement, was the provisions of the union constitution which are before the court which provide that a man shall lose his good standing automatically when he is three months delinquent.* It does not make any difference whether we figure that three months on February 1 or on February 28. * * * " (Emphasis supplied.)

This matter was brought to the attention of counsel sua sponte by the court wherein after pointing out the aforementioned discrepancy the court suggested:[20]

"In view of the foregoing, does not Article XXVI (e) which prescribes the procedure for union certification for delinquency 'by not meeting the requirements of (a) above for membership in good standing in the union' raise a statutory claim? It seems to me that Article XXVI (e) would permit the discharge for a dues delinquency of but two months and since the constitution permits a three months delinquency before termination of union membership, I question whether this is not specifically contrary to the second proviso of 2 Eleventh (a):

" '*Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or *with respect to employees*

[20] Letter dated February 4, 1959.

*to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, * * * uniformly required as a condition of* acquiring or retaining membership.' (Emphasis supplied.)

"Thus, under the above construction, could there be any question but that the court has jurisdiction in the premises?

"Since this matter is raised for the first time by me, I would appreciate hearing the views of counsel at their earliest convenience."

IAM replied that counsel's previous statement was erroneous and proceeded to submit a revised construction.[21]

Plaintiff answered, "that on analysis there is no inconsistency between Article E, Section 14 of the IAM constitution and Article XXVI (a) of the TWA-IAM agreement," however, "there is considerable difference between the IAM's explanation of the consistency of the two sections and Brady's."[22]

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[21] "Upon consideration of the point raised in the Court's February 4th letter, the language of the entire Article XXVI(a), and the record of the proceedings before the System Board of Adjustment, counsel believes that he was in error in stating during the April 21st argument that there is any difference between Article XXVI (a) and Article E, Section 14 of the IAM Constitution." Supplemental Memorandum of IAM in Support of Motion to Dismiss Second Amended Complaint, p. 5, filed March 4, 1959.

[22] Supplemental Reply Brief of Vincent P. Brady, p. 3, filed April 22, 1959. But see plaintiff's letter of February 16, 1959: "Although I have not argued that the inconsistency with respect to dues between the Union Constitution and the IAM-TWA Agreement invalidates the agreement under the Federal Statute, I believe the argument is meritorious and is encompassed within the complaint as initially filed and as amended."

[6] Under the recent Supreme Court pronouncement in Felter v. Southern Pacific Co., [23] it would seem unquestionably that the validity of an agreement executed pursuant to 45 U.S.C.A. § 152, Eleventh (a) is federally cognizable, notwithstanding that the case solely presented a 45 U.S.C.A. § 152, Eleventh (b) agreement.

Particularly applicable to the present litigation is footnote 3, wherein Mr. Justice Brennan states: [24]

> "The Trainmen's position, concurred in by the company, is that this provision means that no revocation cards are to be recognized 'except those reproduced by our organization.' While this construction of the agreement is hardly an obvious one, it is the construction put on the agreement by the parties to it, the Southern Pacific and the Trainmen, and since petitioner in this suit does not question it as a matter of construction, we of course accept it here.
>
> "Since there was no question of interpretation or application of the collective agreement, but rather only one of its validity under the statute, the case is not one in which resort to the grievance and Adjustment Board machinery provided by the Railway Labor Act was required. 'This dispute involves the validity of the contract, not its meaning.' Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 774, 72 S.Ct. 1022, 1025, 96 L.Ed. 1283. Cf. Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239, 242-244, 70 S.Ct. 577, 578-580, 94 L.Ed. 795. The case presents an employee dispute as much, if not more, with the labor organization as with the employer. Cf. Steele v. Louisville & N. R. Co., 323 U.S. 192, 205, 65 S.Ct. 226, 233, 89 L.Ed. 173."

Unfortunately the posture of the immediate proceeding does not mirror Felter, supra, with respect to the con-

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[23] 1959, 359 U.S. 326, 79 S.Ct. 847, 850, 3 L.Ed.2d 854.

[24] Note 23, *supra*.

struction of the respective bargaining agreements. In Felter the agreement, as construed by the carrier and bargaining agent, was not questioned by the aggrieved employee.[25] Here no accord on the interpretation of Article XXVI has been reached.

In view of plaintiff's allegation that defendant violated 45 U.S.C.A. § 152, Eleventh (a), and the patently ambiguous contractual language, with one possible construction leading toward illegality, it is deemed that jurisdiction in the premises has been properly reposed in this court within the purview of Felter, supra.

Accordingly, defendant's motion to dismiss the second amended complaint is denied. The court further denies defendant's application for an interlocutory certificate pursuant to 28 U.S.C.A. § 1292(b). To place this case in proper perspective for appellate review the factual disputes should be resolved.

Submit order.

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[25] Note 23, supra.

Vincent P. Brady, *Plaintiff*,

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and the International Association of Machinists, an unincorporated association, *Defendants*.

Civ. A. No. 1884.

United States District Court

D. Delaware.

July 11, 1961—196 F. Supp. 504

* * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

Plaintiff has sued the above-named defendants for reinstatement to his job and various forms of damages. He contends his discharge by defendant TWA, purportedly based upon a valid union-shop agreement with defendant IAM, was in violation of the Railway Labor Act.[1] Plaintiff and the IAM have filed cross-motions for summary judgment.

[1] After considering the oral argument and various parts of the record, it appears this case may not be disposed of under Rule 56, 28 U.S.C.A., as construed by our Court of Appeals. In this Circuit, a District Court, in disposing of a motion for summary judgment, may not draw inferences from admitted facts, Bragen v. Hudson County News Company, 3 Cir., 1960, 278 F.2d 615; may not use supporting affidavits to overcome well-pleaded facts, Hart & Co. v. Recordgraph Corp., 3 Cir., 1948, 169 F.2d 580; and apparently may not even assume facts against the moving party, Krieger v. Ownership Corp., 3 Cir., 1959, 270 F.2d 265.

[2] In the present case, the question of whether Brady was discharged "for any reason other than the failure

[1] That statute is set out at 45 U.S.C.A. §§ 151-163, 181-188.

* * * to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." (Railway Labor Act, § 2, Eleventh), is at best one of mixed fact and law. Of a similar nature is the issue of "discrimination" on the part of the IAM. Although there are many admitted facts, there is a sharp dispute as to the inferences to be drawn therefrom, and the Court cannot say the law compels one possible inference as against another on each material issue. The area of agreed facts also appears somewhat less than counsel have presumed.

[3] Defendant IAM has moved to strike plaintiff's demand for trial by jury. Intermixed with this issue is the question of whether plaintiff, if successful on his substantive claims, might be entitled to punitive damages. If so, then his claim for a jury trial may be well-founded, for a court of equity, in the absence of express statutory provisions, is without authority to assess punitive damages. William Whitman Co. v. Universal Oil Products Co., D.C. D.Del. 1954, 125 F.Supp. 137. This latter problem will be dealt with first.

[4] Plaintiff relies on two separate and distinct statutory provisions. The first is based on § 2, Eleventh, of the Railway Labor Act, a 1951 enactment in the nature of a proviso "intended to relax the prohibitions contained in paragraphs fourth and fifth of Section 2 * * * against all forms of union security agreements. * * *"[2] S.Rep. No.

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[2] The Court's jurisdiction over this phase of the action is clear, for § 2, Fourth, Fifth, have been authoritatively construed to be enforceable by the courts. Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 1930, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; Virginian Railway Co. v. System Federation No. 40, 1937, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; Railroad Employees' Co-op. Association v. Atlanta B. & C. R. Co., D.C.D.Ga. 1938, 22 F. Supp. 510. Since § 2, Eleventh, was intended solely to limit the effect of those sections, its interpretation and enforcement is likewise left to the courts.

2262, 81st Cong., 2nd Sess. (1950). The Senate Report further stated, "[T]he terms of [§ 2, Eleventh] are substantially the same as those of the Labor-Management Relations Act as they have been administered. * * *" Violations of the corresponding provisions in the Taft-Hartley Act, 29 U.S.C.A. § 158(a) (3), (b) (2), cannot lead to punitive damages. Local 60, United Brotherhood of Carpenters, etc. v. N.L.R.B., 1961, 365 U.S. 651, 81 S.Ct. 875, 6 L.Ed.2d 1. Moreover, the regulation of the economic relations between labor and management is an exceedingly delicate matter, and this Court is unwilling to employ the crude device of punitive damages as a remedy in causes founded on a detailed and pervasive federal statutory scheme without express authorization from Congress. See United Mine Workers of America v. Patton, 4 Cir., 1954, 211 F.2d 742, 47 A.L.R. 2d 850.

[5] Plaintiff's second statutory basis for this action is the duty of a union to bargain fairly on behalf of those it represents and not to act with "hostile discrimination" towards members of the bargaining unit. Steele v. Louisville & N. R. Co., 1944, 323 U.S. 192, 203, 65 S.Ct. 226, 89 L.Ed. 173. Although the rationale that express statutory authority is necessary to award punitive damages as a remedy for violations of a federal statute is somewhat inapposite where the statutory duty itself is only implicit, the Court does not believe the Steele doctrine authorizes such relief.[3] No case has yet gone so far.[4] Moreover, the very threat of punitive damages, as a remedy for violations of a duty which in effect limits the scope of collective bargaining between labor and management, may have un-

[3] Full equitable relief in the form of injunctions is obtainable to remedy Steele violations in spite of the provisions of the Norris-La Guardia Act, 29 U.S.C.A. §§ 101-115. Graham v. Brotherhood of Locomotive Firemen, 1949, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22.

[4] The cases cited by plaintiff all involve state law and are, therefore, inapposite here.

foreseeable effects upon the institution of free collective bargaining itself.[5] In this situation, the fact that the duty itself has been read into the Act by the courts may well be cause to limit the relief obtainable to equitable remedies and compensatory damages. Because of this danger, the duty itself has been restricted by the courts and gives only limited protection.[6] Under these circumstances, the Court does not believe punitive damages may be recovered in actions based upon the Steele doctrine.

[6] The complaint also asserts a common law cause of action, based on state law, either of wrongful discharge (against TWA) or malicious interference with an employment relationship (against the IAM).[7] The issue of punitive damages need not be reached here, for the Court finds § 2, Eleventh, of the Railway Labor Act has deprived the states of their power to regulate discharges under union security agreements within the scope of that statute. Unlike the Taft-Hartley Act,[8] the union security provisions

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[5] See the dissent of Mr. Chief Justice Warren in United Automobile, etc., Workers of America v. Russell, 1958, 356 U.S. 634, 652, 78 S.Ct. 932, 2 L.Ed.2d 1030. The majority held there that since the state had power to act, it could award all damages allowed by state substantive law. The dissent, however, assumes some pertinency when, as here, we are dealing solely with federal law.

[6] See Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L.J. 1327, 1339-43 (1958). Most, if not all, of the successful cases based upon Steele have involved racial discrimination. It seems clear, however, the doctrine is not limited solely to this form of discrimination.

[7] Absent other factors, the Court might have jurisdiction of these causes under Bell v. Hood, 1946, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939; Hurn v. Oursler, 1933, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148.

[8] 29 U.S.C.A. § 164(b), specifically allows prohibitory state law to control over federal in determining the validity of union security agreements under the Taft-Hartley Act.

of the Railway Labor Act are to be effective "notwithstanding any * * * law * * * of any state * * *." Section 2, Eleventh. In view of the detailed and pervasive nature of § 2, Eleventh, and the explicit language contained therein, the Court finds its provisions, in conjunction with § 2, Fourth, Fifth, state in full the rights and duties of employers, unions, and individual employers under union security agreements in the railroad industry. State law can have no application in such a situation.[9]

This holding is in no way a ruling upon the vitality of state law in discharge cases not involving union security agreements. See e. g. Moore v. Illinois Central R. Co., 1941, 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089. Congress has chosen to treat union security problems under the Railway Labor Act in a manner different from that applicable to other grievances. Section 2, Fourth, Fifth, have been traditionally enforced by the courts,[10] and the scope of the limited dispensation from their harsh effect afforded by § 2, Eleventh, must likewise be left to the judiciary.[11] Other problems, such as layoffs by seniority, discharges for inefficiency and the like, not coming within § 2, Fourth,

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[9] To hold otherwise would endanger the federal scheme, whether the state law be more liberal or more strict in dealing with union security agreements. The Supreme Court has found Congress has filled the field and deprived states of their power to act in situations far less strong than this. See Commonwealth of Pennsylvania v. Nelson, 1956, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640.

[10] See note 2, supra.

[11] There is an exception to this rule. Section 2, Eleventh (c), in order to prevent compulsory dual unionism, allows its requirements to be satisfied by membership in a railroad union "national in scope" and qualified under § 3, First, as an elector of the union representatives on the National Railroad Adjustment Board. Section 3, First (f), leaves the determination as to qualification to a special board rather than the courts. Pennsylvania R. Co. v. Rychlik, 1957, 352 U.S. 480, 77 S.Ct. 421, 1 L.Ed.2d 480. This is not an issue in the present case.

Fifth, and, therefore, outside § 2, Eleventh, cannot be within the scope of this ruling.

[7] In view of the foregoing, plaintiff's demand for a jury trial must be stricken. Except for punitive damages, the main relief sought, reinstatement, is equitable in nature, the other requests for monetary compensation, such as back pay, being incidental to this. See Steffen v. Farmers Elevator Service Co., D.C.N.D. Iowa, 1952, 109 F.Supp. 16.

[8] A second reason for striking the demand for a jury trial is that the statutory mandates relied upon do not embrace actions known at common law and are thus outside the scope of the Seventh Amendment. See Steffen v. Farmers Elevator Service Co., supra. Section 2, Fourth, Fifth, protecting the employment relation from discrimination aimed at union activity or inactivity, with the limited exception granted by § 2, Eleventh, establish rights and duties "unknown to the common law." N. L. R. B. v. Jones & Laughlin Steel Corp., 1937, 301 U.S. 1, 48, 57 S.Ct. 615, 629, 81 L.Ed. 893. Likewise, the Steele doctrine, imposed because Congress saw "fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents * * *," limits the power of unions much as the equal protection clause of the United States Constitution, Amend. 14, limits state action. Steele v. Louisville & N. R. Co., supra, 323 U.S. at page 202, 65 S.Ct. at page 232. An action based on this doctrine clearly is unknown to the common law. The demand for trial by jury will be stricken. Other issues raised by counsel may be conveniently disposed of at trial.

Submit order.

* * * * * * * * * *

District Court Opinion

May 3, 1962. (Unreported)

Gentlemen:

My decision on the defendants' motion to dismiss the plaintiff's amendment to the second amended complaint filed in the above-captioned action should have been forthcoming several months ago. Due to an oversight on my part, after considering the matter, I neglected to inform counsel of my ultimate conclusion.

The motion of the defendant to dismiss is denied. However, in accordance with Rule 12 (f), F.R. Civ. P., the court on its own motion will order stricken plaintiff's amendment to the second amended complaint.

The thrust of defendants' argument in support of the motion to dismiss is that the pleading is redundant. If defendants' argument encompasses more than this, the court is not disposed to render an adjudication on the merits of the controversy in the present posture of the litigation. The court agrees, however, that the amendment to the second amended complaint simply realleges, in substance, factual matter contained in the prior pleadings. Moreover, the legal conclusion contained in the most recent pleading is simply a refinement of the previously pleaded broad conclusion that the conduct of the defendant union violated Section 152 (a) Eleventh of the Railway Labor Act. The Court has concluded, therefore, that the amendment to the second amended complaint is in all respects redundant in view of the prior pleadings. Without the amendment, the court is of the opinion all issues of law and fact may be fully litigated and determined. The court will sign an order in accordance herewith.

This case is now at issue and counsel will bring the matter on for trial in accordance with the rules of this Court.

CALEB M. WRIGHT
Chief Judge

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Vincent P. Brady, *Plaintiff*,

v.

Trans World Airlines, Inc., a corporation of the State of Delaware, and the International Association of Machinists, an unincorporated association, *Defendants*.

Civ. A. No. 1884.

United States District Court

D. Delaware.

Nov. 4, 1963—223 F. Supp. 361

* * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

This is an action by an employee alleging that he was discharged from his job in violation of the Railway Labor Act.[1] The complaint seeks reinstatement and damages. Plaintiff, Vincent P. Brady, was and is a resident of Delaware. Defendant, Trans World Airlines, Inc., (TWA) is a Delaware corporation. Defendant, International Association of Machinists (IAM) is an unincorporated Labor Union. There is no diversity of citizenship. Damages have been severed from liability and this opinion deals only with the latter question.

In 1951, Brady was hired by TWA and worked for the company at the Philedelphia International Airport until May of 1956, the date of the alleged wrongful discharge.[2] He was a member of the IAM Local Lodge 1776 during this period. At a meeting of the Local on November 2, 1955, the membership voted to increase dues for workers in Brady's classification from $3.00 to $3.25.[3] Plaintiff

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[1] The Section relied upon is 45 U.S.C. § 152, particularly Section 152, Eleventh (a), of the Railway Labor Act. This Section is made applicable to carriers by air, 45 U.S.C. § 181.

[2] Brady also worked for TWA from October 1, 1946 to May, 1949.

[3] PX 25.

was not present at this meeting but at the next session appeared and challenged the legality of the dues increase.[4]

In the meantime, Gerald C. Coleman was elected financial secretary of the Local Lodge and took office early in January of 1956.[5] Upon taking office he endeavored to get all members of the Union whose dues were in arrears to pay what they owed. Coleman posted a list of delinquent members[6] and on February 15th posted another list of all members who were in arrears two or more months. These members were given ten days to pay on pain of being cited to the District Lodge. Everyone complied with the notices except plaintiff who steadfastly refused to pay or tender dues other than at the old rate of $3.00.[7] He maintained this position even when asked by a Lodge officer to tender at the new rate under protest. The only reason given by plaintiff in justification of nonpayment was the illegality of the increase. On March 3, 1956 Coleman cited the plaintiff and requested District General Chairman Miller to cancel the plaintiff's membership in the IAM.

Miller was away from headquarters when the citation was received and first became aware of Brady's delinquency on March 13, 1956.[8] Miller saw Brady at the Airport in Philadelphia at this time and spoke to him about the dues.[9] Plaintiff explained his position and Miller advised him to pay under protest and appeal through chan-

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[4] Tr. 24, 25.

[5] Tr. 202.

[6] Tr. 221.

[7] Tr. 38, 325-26.

[8] Tr. 356.

[9] Tr. 356-57.

nels.[10] Brady then received a letter dated March 13th advising him to get in good standing by paying his dues. The request asked for unpaid dues including those for the month of March.[11] On March 27th, Brady sent a check to Coleman in the amount of $10.50 for dues for December 1955, January and February 1956, but did not send the March dues as requested in the letter of March 13th.[12]

This check was returned to Brady with a letter from Coleman which stated, "this amount $10.50 is not sufficient to cover your dues and reinstatement fee."[13] The letter then demanded payment of $34.75 by April 4th to cover the reinstatement fee and three months dues. Miller, however, upon learning of the demand, decided it was in error and wrote Brady that a $25 reinstatement fee was sufficient.[14] Plaintiff then asked permission to pay dues alone but his request was refused. On May 1, 1956, Miller requested Brady's discharge under the terms of the union shop agreement with TWA. Plaintiff appealed to the System Board of Adjustment. The Board upheld his discharge.

[1] Plaintiff filed his complaint on May 10, 1957 and the case is now in the posture for final decision. Brady contends first that his discharge, committed at the behest of the Union, was prompted by the Union's hostile discrimination against him. Such conduct would be a breach of the

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[10] Tr. 384.

[11] PX 3. On March 13, 1956 Brady had not paid dues for December, January, February and March Tr. 52.

[12] Tr. 42. Brady mistakenly believed the dues increase had been $.50 rather than $.25. In attempting to pay three months dues, therefore, he sent $10.50 rather than $9.75. It is not disputed, however, that Brady's tender was intended to, and did, cover three months dues at the new rate.

[13] PX 4.

[14] PX 14.

bargaining agent's duty of fair representation and, if proven, appropriate relief would be granted by the Court. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944); Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191 (4 Cir. 1963). Brady's second argument is that the discharge was illegal in that it did not comply with Section 2 (Eleventh) of the Railway Labor Act[15] governing union shop agreements. Because the Court finds Brady has proven facts sufficient to support recovery under this latter theory, the opinion will deal with that issue only, and no facts will be found on the hostile discrimination question.

I *Jurisdiction*

Defendant's threshold contention is that the Court lacks subject matter jurisdiction over Brady's claim since it involves application and the interpretation of Section 2 (Eleventh) of the Railway Labor Act. That provision reads in part:

> "Eleventh. Notwithstanding any other provisions of this chapter, * * * any carrier or carriers * * * and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such con-

[15] 45 U.S.C. § 152 (Eleventh). Hereafter paragraphs of 45 U.S.C. § 152 will be designated simply by their place in Section 2 of the Railway Labor Act, such as 2(First), 2(Second), etc.

dition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership." 45 U.S.C. § 152 (Eleventh).

Application and interpretation of this section, it is asserted, is the sole province of the System Boards of Adjustment since particular cases arising under it may involve interpretation of union security agreements and these Boards have exclusive jurisdiction of cases "* * * growing out of grievances, or out of the interpretation or application of agreements * * *."[16] One line of cases has adopted this reasoning. E. g. Battle v. Brotherhood of Railway Clerks & Steamship Clerks, etc., 320 F.2d 742 (D.C. Cir. 1963). Another line, however, has held to the contrary and has not found the federal courts powerless to act in cases involving 2 (Eleventh). E. g. Cunningham v. Erie R. R. Company, 266 F.2d 411 (2 Cir. 1959).

[2] This Court finds jurisdiction. Section 2 (Eleventh) is not a self-contained, independent statutory provision. It is a proviso, an exception to an express prohibition of the Act beginning with the words "Notwithstanding any other provisions * * *." Prior to the enactment of this section, all forms of union security were barred by the broad provisions of Section 2 (Fourth) (Fifth)[17] which prohibited all employer conduct designed "* * * to in-

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[16] 45 U.S.C. § 184.

[17] 45 U.S.C. § 152 (Fourth) (Fifth). Jurisdiction over this matter has been upheld on these grounds in previous opinions in the case. 196 F.Supp. 504, 506 n. 2 (D.C.Del.1961).

fluence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization * * *."[18] That 2 (Eleventh) was intended by Congress to be a proviso to this prohibition is authoritatively demonstrated by the Senate Report[19] accompanying it. That Report stated, "[it] is intended to relax the prohibitions contained in paragraphs fourth and fifth of section 2 of the Railway Labor Act against all forms of union security agreements * * *." Indeed, Congress explicitly had the Taft-Hartley Act in mind,[20] and the union shop provisions of that statute are merely a proviso to the basic anti-discrimination section.[21] Only when stated loosely, therefore, can plaintiff's claim be said to rest on 2 (Eleventh). More specifically, however, his claim is that because the discharge fell outside that exempting section and is not protected by it, it violated 2 (Fourth) for it was clearly designed "to influence or coerce employees in an effort to induce them to join or remain * * * members of [a] labor organization."[22]

[3] Viewing plaintiff's claim in this manner puts the jurisdictional question in a very different light, for relevant decisions of the Supreme Court, as well as common sense, indicate that 2 (Fourth) is fully enforceable by the federal courts. In Texas & New Orleans Railroad Com-

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[18] In the absence of these prohibitions, the unions and employers would be free to agree to a closed shop, the most stringent union security agreement.

[19] S.Rep.No.2262 in Vol. 2 U.S.Code Congressional Serv. 81st Cong. 2nd Sess. 1950, pp. 4319, 4320.

[20] Ibid. That Report stated, "[T]he terms of Section 2 (Eleventh) are substantially the same as those of the Labor-Management Relations Act as they have been administered * * *."

[21] 29 U.S.C. § 158(a)(3).

[22] It is undisputed that Brady's discharge was a result of the Union's claim that he had not fulfilled his membership obligations in the Union.

pany v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548, 59 S.Ct. 427, 74 L.Ed. 1034 (1930), a district court had issued an injunction restraining the company from interfering with its employees' right to select their bargaining representative freely. The complaint alleged that defendant had coerced members of the plaintiff, the Railway Clerks, to join the Association of Clerical Employees, a company dominated union. After the injunction issued the defendant proceeded to recognize the Association as the employees' exclusive bargaining representative. A contempt citation issued and the company was ordered to disestablish the company union and reinstate the Railway Clerks as the bargaining representative.

[4] On appeal, the Supreme Court found authority for the district court action in Section 2 (Third) of the Act. At that time the latter prohibited "* * * interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other * * *", conduct clearly similar to that involved here.[23] 2 (Fourth) was added to the Act four years after that decision and was in large part an amplification of 2 (Third). Indeed, its principal purpose was to prevent employers from coercing employees into joining unions favored by the carriers, the very action enjoined in that case. See Railway Employes' Department, American Federation of Labor v. Hanson, 351 U.S. 225, 231, 76 S.Ct. 714, 100 L.Ed. 1112 (1956). And there can be no doubt that enforcement of 2 (Fourth) was also entrusted to the courts, for no other agencies, least of all the Adjustment Boards, are either equipped or empowered to deal with conduct impairing the statutory right of employees to be free of

[23] The wording of the statute has been changed slightly. It now reads, "* * * interference, influence, or coercion by either party over the designation of representatives by the other; * * *." Act of June 21, 1934, c. 691 § 2, 48 Stat. 1186.

coercion in choosing bargaining representatives.[24] See Railway Employees Co-op. Ass'n v. Atlanta B. & C. R. Co., 22 F.Supp. 510 (D. Ga. 1938) (enforcing 2 (Fourth)); Virginia Railway Co. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937) (enforcing 2 (Ninth)).

[5, 6] To hold the interrelationship of 2 (Fourth), (Fifth) and (Eleventh) must be applied and interpreted solely by the Adjustment Boards, moreover, violates common sense. The argument supporting such a holding is merely that public statutory rights, when incorporated into a collective agreement, become exclusively private contract rights. Even when stated in that fashion, the argument is not convincing, for there is no reason why concurrent procedures may not exist for the enforcement of these distinct rights. But viewed in the context of enforcement of contract rights under the Railway Labor Act, it is untenable. Application and interpretation of agreements executed under that statute are the sole province of the Adjustment Boards, which are composed of representatives of the contracting parties, the employer and the union.[25] But 2 (Fourth) (Fifth) (Eleventh) embody statutory rather than contract rights and are important legislative limitations on the conduct of the very parties who make up those Boards. To entrust these parties with interpretation and enforcement of restrictions on themselves is little better than leaving them completely free to begin with. Indeed, if application and interpretation of 2 (Elev-

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[24] Under 2 (Fourth), this freedom encompasses the right *not* to join a union.

[25] Article XII(b) of the TWA-IAM collective agreement provides:

> "The System Board of Adjustment shall consist of four (4) members, two (2) selected by the Company and two (2) selected by the Union."

enth) is the sole province of the Adjustment Boards, then Congress did not "relax" the prohibitions of 2 (Fourth) (Fifth) by enacting 2 (Eleventh); it repealed them.[26]

All of this can be illustrated by hypothetical situations indistinguishable on principle from the present case. If a collective agreement contained a clause having language identical to Section 2 (Fourth) without a union shop clause, would an employee discharged for failing to join the union be relegated merely to the Adjustment Boards, agencies composed of the parties which had combined to discharge him? Would a federal court be compelled to hold Congress intended that its jurisdiction would be preempted by a contract enforceable only in an agency composed of the contracting parties? Or if, instead of that provision, the agreement had a union shop clause containing much of the language of 2 (Eleventh), and the incumbent union refused to a valid tender of dues and caused an employee to be discharged because he was a member of another union challenging the incumbent, did Congress intend the only remedy to be in an Adjustment Board composed of representatives of the incumbent and the employer? C. f. Texas & New Orleans Railroad Company v. Brotherhood of Railway & Steamship Clerks, supra. If defendants' argument is correct, however, in both these situations resort must be solely to the Adjustment Boards even though, in the absence of a collective agreement par-

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[26] Compulsory unionism is by no means a dormant political issue in the United States, and only the strongest possible legislative history can override the common sense conclusion that Congress did not leave enforcement of the detailed provisions of 2 (Eleventh) to the very parties it was designed to restrict. And, indeed, this conclusion avoids serious constitutional questions. See Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243 (1926).

roting the statutory language, jurisdiction would clearly lie in the federal courts.[27]

[7] Nor is there any overriding policy compelling courts to eschew jurisdiction over such cases in favor of the Adjustment Boards. Composed of representatives of the Contracting parties, they are designed to encourage private settlements of disputes as to the meaning of contracts. This policy, however, is surely inapposite where, as here, statutory limitations on the power of the contracting parties to engage in certain conduct or to agree to certain matters is involved.

Another purpose of the Adjustment Boards is to bring to the task of interpretation of collective agreements the specialized background of the Board members. And since in 2 (Eleventh) cases, the union shop provisions of the contract may well be relevant to the determination of whether the employee was discharged "for any reason other than the failure * * * to tender the periodic dues * * *", courts may be compelled to undertake incidental "interpretation" of that portion of the contract. This is not, however, an overriding consideration. For one thing, since the employer and the union have already agreed on the validity of the discharge, it is hardly to be expected that the Board will rely heavily on expertise in reviewing the case. In any event, expertise in construing collective agreements is not expertise in enforcing statutory mandates. Union shop clauses, moreover, are not likely to raise difficult questions of interpretation. 2 (Eleventh) itself goes very far to write the parties' contract in this respect and leaves relatively few matters for private determination, little

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[27] Indeed, if defendants are correct, then enforcement of the doctrine recently enunciated in International Association of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1960), may be taken from the federal courts and left solely with the Adjustment Boards merely by paraphrasing the holding of that decision as a contractual provision.

more in fact than the date on which dues must be paid, the amount, and procedures for discharge. In any case, if the particular union shop clause is ambiguous, the need for judicial protection may be greater for the opportunities for discrimination will be correspondingly increased. There is little reason indeed why such a clause should be vague for, given a desire to comply with 2 (Eleventh), all that is necessary is a clear rule uniformly applied. While questions of interpretation may arise, therefore, they are not such as to require the federal courts to abstain from exercising jurisdiction in these cases.

II *The Merits*

The contract between IAM and TWA provides:

> "(a) Each employee now or hereafter employed in any work covered by this agreement shall, as a condition of continued employment in such work, within sixty (60) days following the beginning of such employment or the effective date of this Article, whichever is later, become a member of, and thereafter maintain membership in good standing (as herein defined), in the Union, except as provided otherwise herein. Such condition shall not apply * * * with respect to any employee to whom membership is denied or terminated for any reason other than the failure of the employee to tender the dues uniformly required of other members of his classification (and at his point on the Company's system) as a condition of acquiring or retaining membership.
>
> "For the purpose of this Article, 'membership in good standing in the Union' shall consist of the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month, which are uniformly required of members of his classification (and at his point on the Company's

system) as a condition of acquiring or retaining membership.

* * * * * * * * * *

"(e) When an employee becomes delinquent by not meeting the requirements of (a) above for 'membership in good standing in the Union,' the following procedure shall be observed:

"(1) The General Chairman of the Union shall notify the employee by registered letter, return receipt requested, copy to the Company's Vice President of Industrial Relations, that the employee is delinquent in the payment of dues as specified herein and accordingly is subject to discharge as an employee of the Company. * * *

* * * * * * * * * *

"(n) Whenever the term dues is referred to in this Article, such use of the word 'dues' shall include initiation or reinstatement fees, periodic dues, and assessments (not including fines and penalties), * * *."

Under the TWA-IAM collective bargaining agreement membership in good standing meant the payment by the employee of dues for each calendar month, not later than the last day of the following calendar month. On March 13, 1956, the Union sent Brady a letter demanding dues for December, January, February and March. Under the plain terms of the contract, however, plaintiff owed only two months dues. December dues were owing no later than January 31st, January dues were owing no later than February 28th but February dues did not have to be paid until March 31st. On March 27th, therefore, the payment of two months dues—$6.50—would have precluded plaintiff's discharge. On that day, Brady tendered $10.50.

The Union rejected his tender on the grounds that $10.50 was "not sufficient to cover * * * dues *and* reinstatement fee". This certainly was sufficient to cover Brady's dues

unless he was not entitled to rely on the clear provisions of the collective agreement. To be sure, it was hardly adequate to cover $25 reinstatement fee, but that had not been demanded by the Union in its letter of March 13th.[28]

The next IAM demand was for the payment of $34.75 by April 4th to "cover past dues and reinstatement fee." Since the reinstatement fee was $25, the demand for $34.75 contemplated only a *three month* delinquency ($9.75) *by April 4th* even though the Union had previously been demanding *four months* dues by *March 28th.*[29] Indeed, on

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[28] Miller testified the March 13th letter was in error since it did not request a reinstatement fee. After he learned it had been sent to Brady, however, he told Coleman that if the four months dues requested were paid, it would be all right. Tr. 362. Since Brady had no knowledge of this conversation, its relevance after the fact is highly questionable.

Coleman's letter, moreover, written "as a result of instructions from Mr. Cliff Miller", rejected the tender of $10.50 on the grounds it was inadequate to cover "dues *and* reinstatement fee." Further, the Union constitution authorizes a reinstatement fee only after a three month delinquency. The agreement itself, while it mentions reinstatement fees, does not specify when they are to be imposed. Assuming the provisions of the Union constitution may be validly incorporated merely by such an oblique reference, they must still be read in conjunction with the explicit terms of the agreement, which is, after all, the governing document under 2 (Eleventh). Because the agreement does not require payment of dues, and thereby postpones a delinquency, until the last day of the following month, there was not a three month delinquency until March 31st. No other reading of these documents is consistent with the policy underlying 2 (Eleventh) which is designed to give affected employees adequate notice of their union security obligations. See note 28 infra, and accompanying text.

[29] Coleman explained his demand for $34.75 in the following way. It was his belief, he testified, that the December, January, and February dues still had to be paid but that the reinstatement fee took the place of March dues. He gave no indication whatsoever of the source of this belief.

All of the Union demands made upon Brady seem to have assumed that dues had to be paid by the first day of the month, i.e., December dues by December 1st, etc., that this is utterly incon-

March 28th, the Union had flatly rejected a tender more than adequate to cover three months. And since March 31st was a due date under the collective agreement, the demand for three months dues by April 4th is consistent solely with the proposition that only two months were due March 27. The IAM, however, quickly abandoned the $34.75 demand, but not on the grounds that the amount of dues demanded was too little. The Union's final position was merely that payment of the reinstatement fee alone was adequate.

Defendants have argued that, in any event, the demands of the March 13th letter were not oppressive since at that point even more severe penalties, discharge or a reinstatement fee, could have been imposed. This contention, however, overlooks the fact that only past dues were demanded and these in an excessive amount. There is little reason why Brady or any employe in a similar position should be obligated to explore what other and more severe penalties could be imposed in order to determine whether compliance with an *ad hoc* demand of the Union is necessary. Since the letter of March 13th asked only for past dues, Brady had ever right to calculate under the terms of the agreement alone, the amount owed and to tender that sum. And, indeed, the Union's rejection of the tender, as reflected in the March 28th letter, was not based merely on an alleged insufficiency as to dues but on its failure "to cover * * * dues *and* reinstatement fee" (emphasis added).

It is the Court's view, therefore, that regardless of what other penalties might have been available to the Union on March 13th, its own requests were sufficient to justify

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sistent with the contract specification that "payment . . . [must be made] not later than the last day of the following calendar month. * * *" is too plain for argument. The contract, moreover, is the governing document, for 2 (Eleventh) validates union shop provision only when incorporated into an "agreement". Requirements inconsistent with the contract, whether in the Union constitution or in letters to Brady, can be of no effect.

Brady's tender of March 27th. But, in any event, no other penalties were available at that date. Discharge could occur only after compliance with the procedural requirements as to notice specified in the collective agreement. This had not been done on March 13th. Further, a reinstatement fee could not be imposed until there was a three month delinquency and that did not occur until March 31st.

[8] All of this is perfectly consistent with Section 2 (Eleventh). That provision allows discharges otherwise violative of 2 (Fourth) only when a proper union security clause has been incorporated into an *agreement*. Plainly, one purpose underlying this requirement is to give adequate notice to affected employees of their union security obligations.[30] In short, employees need not resort to *ad hoc* correspondence from Union officers to determine their rights and duties. In the present case, however, the IAM's defense has been based almost exclusively upon letters sent to Brady which neither complied with the agreement nor were consistent with each other. There is no reason whatsoever why TWA and the IAM cannot incorporate clear union security provisions into their agreement which give adequate notice to the affected employees of the obligations imposed. Nor is there any reason why, having written such provisions into the agreements, they cannot apply them uniformly and comply with the requirements themselves. There is every reason why, however, they should not be allowed to discharge employees when they have failed to do these things. In the present case, the agreement is relatively clear, but IAM's rejection of Brady's March 27th tender did not comply with it and was utterly inconsistent with any obligations of which Brady had proper notice.

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[30] Arguably, this policy might prohibit incorporation of Union constitution provisions merely by reference. In this case, application of such a rule would bar imposition of a reinstatement fee. See note 27, supra. That is, however, unnecessary to decide.

[9] Because Brady's tender was sufficient to cover "the periodic dues * * * uniformly required * * *," the discharge is not protected by 2 (Eleventh). It is, therefore, violative of 2 (Fourth).

[10] One problem remains: whether the IAM should be held jointly liable with TWA.[31] Section 2 (Fourth) prohibits carriers from exercising coercion. It says nothing express about unions. Section 2 (Eleventh), however, the exception to Section 2 (Fourth), uses the term "agreements". It was within Congress' contemplation that both the Union and the carrier would be signatory to the collective bargaining agreements. Since both parties were treated equally in Section 2 (Eleventh), and since Congress knew that the section was an exception to certain prohibitions, it is sound to conclude that Congress thought the Union might also be liable under Section 2 (Fourth) when it caused an illegal discharge.[32]

III *Exhaustion of Intra-Union Remedies*

[11] IAM contends plaintiff may not bring this action because he failed to exhaust his intra-union remedies. But the only matter involved in this case is the legality of Brady's discharge under the Railway Labor Act, not the legality of the increase in dues or even IAM's rejection of his March 27th tender. After this decision, IAM is free to continue to reject Brady's dues, if it desires, so long as TWA does not discharge him. Brady, moreover, is seeking reinstatement in his job and neither the Union President, its executive council nor the National Convention can

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[31] The TWA-IAM agreement contemplates that TWA might be found liable for illegal discharges under the union security agreement and provides that the IAM will indemnify it for losses incurred. PX 6, TWA-IAM Union Shop Agreement, Art. XXVI, para. (p).

[32] The Taft-Hartley analogy may again be relevant, see note 19, supra, for under 29 U.S.C. § 158(b)(2), the Union would be liable in these circumstances.

grant him that. Indeed, the most they can do is apologize. The available intra-union remedies are, therefore, not only inadequate but irrelevant.

[12] In any event, the doctrine of exhaustion of internal union remedies is entirely inapplicable in situations, as here, which do not involve internal union problems. Under the Railway Labor Act, IAM is entirely free to reject Brady's tender of dues and even to expel him. It may do all of these things because they involve the union-member relationship and the Act leaves that untouched.[33] But when the Union strikes at the employment relationship and has an employee discharged, that is a different matter. At that point, it ceases to be a solely internal union problem, if for no other reason, because the employer is now involved. Nor is there anything whatsoever in the statutory language or legislative history supporting the IAM's contention. The Taft-Hartley analogy—which Congress explicitly had in mind when it drafted 2 (Eleventh)[34]— is again appropriate. No one has even suggested, much less held as a matter of law, that an employee illegally discharged under a Union security agreement, must exhaust internal Union remedies before applying to the National Labor Relations Board for relief under Section 8(a)(3). Policies, such as the exhaustion doctrine, designed to give private organizations principal responsibility for governing their internal affairs are, therefore, wholly inapposite in situations involving federal regulations of the employment relationship.

IV

[13, 14] The Court previously severed the trial of the liability issues from the damage questions. The nature of plaintiff's recovery still must be explored. For the guid-

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[33] Except, of course, where that relationship is such as to violate the "uniformity" requirement of 2 (Eleventh).

[34] See note 19, supra.

ance of the parties, plaintiff will be entitled to compensatory damages and reinstatement. The Court finds no barriers to this latter form of relief since it merely involves a mandatory injunction and that has been used in analogous situations by the Supreme Court.[35] Such relief is also supported by the Taft-Hartley analogy[36] and seems necessary to effectuate the congressional policy fully.

The foregoing opinion is adopted as the Court's findings of fact and conclusions of law pursuant to F.R. Civ. P. 52 (a), 28 U.S.C.A.

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[35] See Virginian Railway Co. v. System Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937).

[36] Reinstatement is a common remedy under Taft-Hartley. 29 U.S.C. § 160(c). Even though the liability issue has been severed from damages, the availability of reinstatement has been dealt with at this stage because one contention of defendants has been that Brady's demand for reinstatement ousts the Court from jurisdiction.

Vincent P. Brady, *Plaintiff,*

v.

Trans World Airlines Inc., a corporation of the State of Delaware, and The International Association of Machinists, an unincorporated association, *Defendants.*

Civ. A. No. 1884.

United States District Court

D. Delaware.

Sept. 3, 1965—244 F. Supp. 820

* * * * * * * * * *

CALEB M. WRIGHT, Chief Judge.

The Court has found for plaintiff on the question of liability. See Brady v. Trans World Airlines, Inc., 223 F. Supp. 361 (D. Del. 1963). The question of damages has been reserved. This opinion deals with damages.

The facts of this case are adequately set out in the opinion cited and will not be repeated. While that opinion concerned jurisdiction and the merits of Brady's claim, the Court concluded:

> "For the guidance of the parties, plaintiff will be entitled to compensatory damages and reinstatement. The Court finds no barriers to this latter form of relief since it merely involves a mandatory injunction and that has been used in analogous situations by the Supreme Court. Such relief is also supported by the Taft-Hartley analogy and seems necessary to effectuate the congressional policy fully."[1]

Thus the Court indicated prospectively that the elements of recovery which would be considered were reinstatement and compensatory damages. Subsequent argument con-

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[1] Brady v. Trans World Airlines, Inc., 223 F.Supp. 361, 370 (D.Del.1963).

cerning the damages recoverable by Brady and briefs directed to that question have not altered this conclusion.

[1, 2] Brady must be reinstated in the same position he held before his discharge or in a substantially equivalent position. In determining whether a new position is substantially equivalent to the one previously held by Brady, such factors as seniority rights, fringe benefits, wages, hours, and security of position are to be considered. See CCH Labor Law Reports ¶ 4730. Furthermore, whether Brady is reinstated in the same position he held before discharge or in a substantially equivalent position, it should be kept in mind that he is entitled to the benefits he would have had *now* had he not been discharged and not just to the same job or one equivalent to it at the time of his discharge minus the benefits which have accrued to the position in the years since discharge.

[3] The element of compensatory damages is somewhat more troublesome. Into this recovery plaintiff seeks to inject such items as back pay, damages for mental suffering arising from the humiliation and embarrassment caused Brady by his illegal discharge, damage to reputation, unforeseen expenses and punitive damages assessable against defendant IAM for willful and deliberate acts of discrimination. Further, Brady has recently moved to join his wife as an additional party plaintiff claiming damages for loss of consortium.

In addition to reinstatement the Court finds Brady entitled only to an award of back pay. Not only does the Court deem such recovery adequate to compensate Brady, but it is the sole recovery which is supported by the Taft-Hartley analogy relied upon by Congress in enacting 2 (Eleventh).[2] While other measures of recovery are not

[2] The Court previously pointed out that Congress was expressly aware of the relation of Taft-Hartley and the Railway Labor Act. See Brady v. Trans World Airlines, Inc., 223 F.Supp. 361 at 364-365 (D. Del. 1963).

specifically denied to employees unlawfully discharged within the terms of Taft-Hartley, reinstatement and back pay are expressly provided in that Act.[3] This Court will not read into the provisions of the Railway Labor Act the full scope of common law tort and contract recovery without express congressional provision therefore and with the example of Taft-Hartley to the contrary.

[4] In computing the amount due Brady as back pay, Brady's earnings since his discharge must be deducted from the amount he would have earned had he not been discharged.

Defendant IAM contends that Brady is entitled to no more than nominal damages because he failed to mitigate his damages by paying the $25 reinstatement fee demanded of him by the union. This fee, defendant points out, was only $8.75 more than the dues Brady owed. Because the amount required to achieve reinstatement was small, because Brady's refusal to pay was motivated by a spirit of "non-conforming eccentricity" and because, the reasonably prudent man would have sought reinstatement and *then* pursued his remedies, the argument goes, Brady's refusal to pay the $25 reinstatement fee amounts to failure to comply with the duty to mitigate damages.

The Court has upheld Brady's right to refuse to pay the reinstatement fee because he did not owe it. Judged by the defendant's own prudent man standard, Brady was justified in refusing to pay the $25 reinstatement fee.

Section 14 of the IAM constitution reads:

> "Sec. 14. Delinquency for 3 months in the payment of dues or assessments shall automatically cancel membership and all rights, privileges and benefits incident thereto. The period of good standing membership of members whose membership has been cancelled for delinquency, or other cause shall date from their last

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[3] 29 U.S.C.A. § 160(c).

> reinstatement, as shown by the G.L. records, and their rights, priivileges and benefits under the provisions of this Constitution shall attach and date from their last reinstatement, as though they had never before held membership in the I.A.M." Section 14, Article E, Constitution IAM, effective April 1, 1954.

Thus, it would be reasonable for Brady to believe that if he paid the reinstatement fee, he might get his old job but his seniority with its attendant benefits would date from the time of reinstatement. Whether or not this belief would be borne out after further resort to internal union remedies, the fear that his seniority would be lost was not unreasonable under the circumstances. Therefore the payment of $25 did not represent the opportunity which IAM supposes.

It should be noted, moreover, that IAM's illegal act was not in requesting an excessive sum from Brady but in causing TWA to discharge him because he would not pay it. Defendants' argument, therefore, compels one in Brady's position to anticipate illegal conduct and to comply with all of the defendants' demands lest the latter be tempted to violate a legal duty. It is little better than arguing that a person wounded by a robber may not sue for the full extent of his personal injuries because he would not have been shot had he turned over his wallet.

[5, 6] In any event, the evident congressional purpose would not be fulfilled by such a holding. Section 2 (Fourth), (Fifth), (Eleventh) represent a compromise under which employment may be conditioned upon compliance with union demands only to the extent of payment of uniform periodic dues. Demands going beyond this may not be enforced by causing the employer to exercise his economic power against the offending employee. Clearly, Congress desired to protect the employee's right to dissent and to disobey union instructions (or, indeed, to be moved by a spirit of "non-conforming eccentricity") without fear

of reprisals involving the employment relationship. On the other hand, "free rides" are not possible because all members of the unit can be required to pay dues.

To hold that employees suing under 2 (Fourth), (Fifth), (Eleventh) may recover only the amount of the excessive sums demanded, however, would not effectuate that purpose. If that were the law, dissenting employees could be harassed by excessive demands for dues under the threat of discharge and their only remedy would be to hire a lawyer and sue for reimbursement. Congress might as well have legalized the closed shop as have enacted such a cynical and toothless provision. It should further be noted that the corresponding provisions of the Taft-Hartley Act have not been read so as to require mitigation.

Finally, the Court must consider plaintiff's motion to join Mrs. Brady as a party seeking damages for loss of consortium. Plaintiff concedes that Mrs. Brady's claim derives from that of her husband. "Mrs. Brady's claim is a claim for her pain and suffering which results derivatively from the pain and suffering suffered by her husband. If he has no claim, logically, she has no claim."[4]

The Court has found that Brady has no claim for damages for pain and suffering. Thus, Mrs. Brady has no claim. The motion to join her as a party plaintiff is denied.

In conclusion, the Court finds plaintiff entitled to reinstatement and back pay due to his illegal discharge from the defendant, TWA. See Brady v. Trans World Airlines, Inc., 223 F. Supp. 361 (D. Del. 1963). The incidents of said reinstatement and back pay are outlined above.

Present order.

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[4] Letter memorandum of counsel for plaintiff dated October 26, 1964, p. 2.

Memorandum Opinion of District Court

September 6, 1966.

(Unreported)

WRIGHT, Chief Judge.

The Court has previously found for plaintiff on the question of liability, see Brady v. Trans World Airlines, Inc., 223 F. Supp. 361 (D. Del. 1963), and has already discussed the issue of damages, see Brady v. Trans World Airlines, Inc., 244 F. Supp. 820 (D. Del. 1965).

The facts of this case and the law concerning damages are adequately set out in the above cited opinions and will not be rediscussed. The Court's present concern is to determine the damages received by Brady and to order the proper remedy to correct them.

REINSTATEMENT

The Court has considered all the evidence presented concerning Brady's reinstatement. Although TWA will incur some cost in retraining Brady, Brady can be retrained and can become an adequate aircraft machinist again. The cost of retraining Brady to service jets should be less than the cost of training a raw recruit since Brady is already familiar with aircraft and holds a license to maintain an aircraft propelled by reciprocating engines, consequently no great hardship will be imposed on TWA. Moreover, Brady requests reinstatement and, on balancing the various considerations involved, including the public interest in airline safety, the Court feels reinstatement is the proper remedy. He shall be reinstated in accordance with the Opinion of Brady v. TWA, 244 F. Supp. 820 (D. Del. 1965).

BACK PAY AWARD

Brady is entitled to the difference between what he would have earned from TWA if he had not been illegally discharged minus what he actually earned following his

discharge. Brady v. TWA, 244 F. Supp. 820 (D. Del. 1965).

In computing Brady's actual earnings during this period, unemployment compensation payments have not been included. Cf. National Labor Relations Board v. Gulett Gin Co., 340 U.S. 361 (1950). The Court also finds that Brady was justified in leaving Capitol Air Sales in 1961 so he has not failed to mitigate his damages.

Brady's loss of earnings from 1956-1964, taking into account the entire period including those years in which Brady earned more than the average of comparable employees	$ 7,241.24
Brady's loss of earnings in 1965 compared to average of comparable employees	2,816.09
Brady's loss of earnings from Jan. 1, 1966, to June 30, 1966, compared to comparable employees	560.47
Total Back Wages Owed Brady	$10,617.80

No award of back wages has been allowed from June 30, 1966, to date because no figures concerning this period have been submitted to the Court.

Fringe Benefits

Having ordered reinstatement, Brady is entitled to reinstatement in all fringe benefit programs as if he had continued in TWA's employment without interruption by the illegal discharge. However, two fringe benefits must be discussed to some extent.

Brady would have been entitled to various free airline passes during this period had he been in TWA's employment. These passes can only be used by Brady and the member of his immediate family so that unless used each year they would lapse. Furthermore, the passes are subject to the contingency that space is available on the particular flight. Brady has requested the reasonable value of these passes during the period following his illegal dis-

charge. However, Brady has not introduced any evidence on which this Court could determine the financial value of the passes. No award can be made for them.

Turning to the retirement program of which Brady was a member when discharged, Brady should be reinstated in it; however, this is a volutnary program into which the employee and employer each contribute a certain amount. To be reinstated in this program, Brady must contribute the sum which he would have contributed over this period as well as having TWA contribute its share. All other fringe benefits at TWA were comparable to those Brady enjoyed at his other places of employment, and reinstatement in the TWA's programs is adequate to compensate Brady.

Counsel Fees

On July 19, 1966, the Court wrote the parties requesting that they brief the question of whether attorney's fees were appropriate in this case. On July 21, 1966, Brady's present counsel stated he would not make an application for attorney's fees, but wished the Court to delay until Counsel, who had previously been in the case and had withdrawn, had an opportunity to petition the Court. On August 24, 1966, the previously retained counsel, who had withdrawn, wrote the Court and stated that he would not press for an allowance of attorney's fees to be paid by the defendants. Since neither counsel has made a formal application for counsel fees, the Court need not determine if counsel would be entitled to them.

The foregoing opinion is adopted as the Court's findings of fact and conclusions of law pursuant to F.R. Civ. P. 52(a), 28 U.S.C.A.

Wilmington, Delaware
September 6, 1966

District Court Order of September 6, 1966
(Unreported)

AND NOW, TO WIT this 6th day of September, 1966, the Court having had before it plaintiff's motion to amend to add a party, and question as to the measure of damages, briefs having been filed, and the matter having been considered in the Court's Opinion of September 3, 1965, and the Court having heard the testimony as to damages on July 7, 1966, and having explained its computation of them in a Memorandum Opinion filed this date; it is

(1) ORDERED, that plaintiff be reinstated to the same or a substantially equivalent position by defendant, Trans World Airlinnes, Inc. with company seniority from October 1, 1946 and Philadelphia Point Seniority date from February 21, 1951; it is

(2) FURTHER ORDERED, that defendant Trans World Airlines, Inc. shall secure for plaintiff without cost to plaintiff such additional training and schooling as plaintiff shall require for employment as an aircraft mechanic; and it is

(3) FURTHER ORDERED, that defendant Trans World Airlines, Inc. shall secure to plaintiff the following additional rights without cost to plaintiff as though plaintiff's employment had been without interruption: Membership in the Retirement Fund, Membership in the Group Life Insurance Plan, Membership in the Group Hospital Plan, Membership in the Group Health and Accident Plan, or equivalents; in respect to membership in the retirement plan, Brady shall be reinstated in full membership in good standing and all payments which should have been made by TWA shall be made by TWA, and all payments which should have been made by Brady shall be paid by Brady; and it is

(4) FURTHER ORDERED, that such other or additional fringe benefits shall be restored to plaintiff by defendant Trans World Airlines, Inc. without cost to plaintiff as

though plaintiff's employment had been continuous; and it is

(5) FURTHER ORDERED, that The International Association of Machinists shall reinstate plaintiff in membership, in good standing, without cost to plaintiff, in The International Association of Machinists with seniority from October 1, 1946 and Philadelphia Point Seniority from February 21, 1951, as though plaintiff's membership had been without interruption and with all the prerequisites and rights incident to such seniority; and it is

(6) FURTHER ORDERED, that plaintiff shall receive as damages for back pay the amount of $10,617.80; and it is

(7) FURTHER ORDERED, that plaintiff shall not be liable for costs in the District Court; and it is

(8) FURTHER ORDERED, that for the purposes of paragraphs 1-6 of this order, the effective date upon which plaintiff shall be restored to his various rights shall be the date upon which any appeal or petition for certiorari, motion for reargument, or the like, if any, whether taken by plaintiff or defendants shall become final and binding upon the parties and no further application may be made within the judicial system of the United States; and it is

(9) FURTHER ORDERED, that plaintiff's application to join as a party-plaintiff plaintiff's wife be and the same is denied.

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